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United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Appellant,

VS.

EBNER GOLD MINING COMPANY, a Corporation, THE ALASKA-EBNER GOLD MINES COMPANY, a Corporation, ANGUS MACKEY, as Receiver for THE ALASKA-EBNER GOLD MINES COMPANY, a Corporation, and DOWNIE D. MUIR,

Appellees.


Transcript of Record.

VOLUME VII.

(Pages 2401 to 2746, Inclusive.)

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

Filed



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Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

Page 96

Locators: Geo. Harkrader, Henry Coon and D. Campbell.

Date: Sept. 5, 1887.

Filed and recorded: Sept. 6, 1887.

Claim: 800 inches of water from Gold Creek.

[2180]

Place of intended use: Discovery placer mining claim, located by Joseph Juneau, and R. T. Harris.

Page 97

Locator: Wm. Ripstein and John Regan.

Date: Aug. 24, 1887.

Filed and recorded: Sept. 6, 1887.

Claim: "500 inches of this creek."

[In margin:] "Omitted."

Page 98

Locator: C. S. Blackett.

Date: Sept. 2, 1887.

Filed and recorded: Sept. 19, 1887.

Claim: Water right commencing one hundred yards up Thompson Creek.

Page 99

Locators: Thomas S. Nowell and Frank H. Nowell.

Date: Sept. 27, 1887.

Original notice posted on claim dated Sept. 17, 1887.

Filing and recording date omitted.

Claim: 5000 inches of water from Gold Creek.

Place of intended use: Nowell Mining property, Douglas Island.

Locators: Thomas S. Nowell and Frank H. Nowell

Date: Sept. 27, 1887.

Original notice posted on claims dated Sept. 17, 1887.

Filed and recorded: Sept. 28, 1887.

Claim: 5000 inches of water from Salmon Creek.

Place of intended use: Alaska Union and Alaska
Consolidated Mining Com-
panies lode claims, Doug-
las Island.

Locators: R. G. Willoughby and P. Corcoran.

Date: Sept. 27, 1887.

Filed and recorded: Oct. 18, 1887.

Claim: all the water running in Mineral Creek on
Admiralty Island.

Place of intended use: Windfall Mines.

[In margins:] "Omitted." "Outside Dist."

[2181]

Locators: The Alaska Union Mining Company by
Thos. S. Nowell, Prest. and F. H. No-
well.

Date: Oct. 18, 1887.

Filed and recorded: Oct. 27, 1887.

Posted: Oct. 18, 1887.

Claim: 10,000 inches of water of Salmon Creek.

Place of intended use: Nowell mining property,
Douglas Island.

Locators: L. L. Thorp, B. E. Haney.

Date omitted.

Filed and recorded: Dec. 27, 1887.

Claim: 1000 inches of water in Nevada Creek, Douglas Island.

Locator: John G. Heid.

Date omitted.

Posted: Mar. 2, 1888.

Filed and recorded: Mar. 16, 1888.

Claim: 10,000 inches of water from Fall River.

Place of intended use: Bullion Lode, Samson and Sampson No. 2, lode claims.

Locator: Thomas S. Nowell.

Date: May 17, 1888.

Posted: May 17, 1888.

Filed and recorded: May 31, 1888.

Claim: 500 miners inches of water from Gold Creek.

Place of intended use: Ground Hog and Summit mill sites.

Locators: O. Price and R. J. Willoughby.

Date: June 1, 1888.

Filed and recorded: June 4, 1888.

Claim: All the water of Mineral Creek.

Place of intended use: Spokane Quartz Mining
Claims.

[In margins:] "Admiralty Is Omitted." "Outside
Dist." [2182]

Locator: Chas. F. Depue, agt. for Eastern Alaska
Mining Co.

Date: June 6, 1888.

Posted: June 5, 1888.

Filed and recorded: June 6, 1888.

Claim: 500 miners inches of water from Sheep
Creek.

Place of intended use: Mexico Mill Site.

Locators: W. C. Boyd and E. Aanland.

Date: May 31, 1888.

Filed and recorded: July 12, 1888.

Claim: The falls and water of Nevada Creek, Doug-
las Island, at the Hartford lode about 1
mile from salt water.

Page 155

Locators: Pat McGlinchy and Thomas J. McCully.

Located: July 21, 1888.

Filed and recorded: July 23, 1888.

Claim: 2000 inches of water of Gold Creek.

Page 156

Locator: Thomas S. Nowell.

Date: Aug. 16, 1888.

Posted: Aug. 9, 1888.

Filed and recorded: Aug. 17, 1888.

Claim: 500 miners inches of water from Gold Creek.

Place of intended use: Ground Hog Mill Site.

Page 158

Locator: "Stillman Lewis for the company."

Date: Aug. 14, 1888.

Filed and recorded: Aug. 27, 1888.

Claim: The water of Montana Creek.

Place of intended use: Congress 1st and East Congress quartz locations.

[In margins:] "Omitted." "Outside Dist."

[2183]

Page 160

Locator: Hugh Murray.

Date: Sept. 2, 1888.

Filed and recorded: Sept. 12, 1888.

Claim: 300 inches of water of "a certain creek now unnamed immediately back of my cannery site near Chilcat Inlet Alaska."

Place of intended use: Locator's cannery.

[In margins:] "Omitted." "Outside Dist."

Locator: Samuel Coulter.

Date: Nov. 17, 1888.

Posted: Nov. 15, 1888.

Filed and recorded: Nov. 17, 1888.

Claim: 700 inches of water of Gold Creek.

Place of intended use: Locator's ten stamp quartz
mill situated on South
side of Said Gold Creek.

Locators: Henry States, Samuel Howarth and
Henry Boursin.

"Located" Jan. 2, 1889.

Filed and recorded: Jan. 4, 1889.

Claim: 2000 inches of Cascade Creek.

[In margins:] "Omitted." "Outside Dist."

Locator: Wm. C. Antisell.

"Located" Jan. 1, 1889.

Filed and recorded: Jan. 4, 1889.

Claim: 10,000 inches of water of Antisell Creek.

Place of intended use: wheresoever needed.

[In margins:] "Omitted." "Outside Dist."

Page 171

Locators: Sam Howarth and E. Van Buren.

Date: Jan. 1, 1889.

Filed and recorded: Jan. 10, 1889.

Claim: 5000 miners inches of water of Salmon Creek.
[2184]

Page 176

Locator: B. F. Nowell, as agent for the Con. Mining
Co.

Date: Feb. 19, 1889.

Filed and recorded: Feb. 22, 1889.

Claim: 300 miners inches of water of Cowee Creek,
Douglas Island.

Page 178

Locators: L. L. Williams, F. E. Howard and A. T.
Howard.

Date omitted.

Posted: Feb. 18, 1889.

Filed and recorded: Feb. 22, 1889.

Claim: 1500 inches of water from Sheep Creek.

Place of intended use: Golconda Mill Site.

Page 179

Locator: F. H. Burfeind.

"Located" Feb. 23, 1889.

Filed and recorded: Feb. 25, 1889.

Claim: 10,000 inches of water of Lemon Creek.

Locator: F. H. Burfeind.

"Located" Feb. 19, 1889.

Filed and recorded: Feb. 25, 1889.

Claim: 10,000 inches of water of Lemon Creek.

Locator: Henry Boursin.

"Located" Feb. 18, 1889.

Filed and recorded: Mar. 1, 1889.

Claim: 6000 inches of water of Lemon Creek.

Place of intended use: Storm King, New Moon, Snow
Drop, Crystal Eclipse, Jus-
tice and Yankee Blade
claims. [2185]

Date: May 20, 1885.

Filed and recorded: May 21, 1885.

Claim: "The water running in the Northwest branch
of Harper Creek, Douglas Island, A. T., to
the extent of 300 inches."

Locator: S. O. Wheelock and David Flannery.

Date: May 20, 1885.

Filed and recorded: May 21, 1885.

Claim: 800 inches of water in the Middle Branch of
Harper Creek, Douglas Island, A. T.

Locator: S. O. Wheelock and David Flannery.

Date: May 20, 1885.

Filed and recorded: May 21, 1885.

Claim: 500 inches of water in the Southeast Branch
of Harper Creek, Douglas Island, A. T.

Locator: M. A. Hays.

Date: May 18, 1885.

Filed and recorded: May 25, 1885.

Claim: 5000 inches of water of Gold Creek.

Place of intended use: Garside Mine.

Locators: J. Treadwell, R. Willoughby, M. Murry,
D. R. Price.

Date: Apr. 23, 1885.

Filed and recorded: June 16, —.

Claim: "Wild Goose Creek to the extent of all the
inches for mining purposes."

Place of intended use: Admiralty Mining Co.'s Lo-
cations.

[In margins:] "Omitted." "Outside H. M. D."

Locators: J. Treadwell, R. Willoughby, M. W.
Murry, D. R. Price.

Date: April 24, 1884.

Filed and recorded: June 18, 1885.

Claim: 1000 inches of Crow Creek. [2186]

Place of intended use: Admiralty Mining Co.'s Lo-
cations.

Page 11

Locators: J. Treadwell, R. Willoughby, M. W. Murry,
D. R. Price.

Date: April 22, 1885.

Filed and recorded: June 18, 1885.

Claim: 1000 inches of Mink Creek.

Place of intended use: Admiralty Mining Co. Loca-
tions.

[In margins:] "Omitted." "Outside H. M. D."

Page 11

Locators: John Treadwell, R. Willoughby, M. W.
Murry, D. R. Price.

Date: April 24, 1884.

Filed and recorded: June 18, 1885.

Claim: 2000 inches of water of Salmon Creek.

Place of intended use: Admiralty Mining Co. Loca-
tions.

[In margins:] "Omitted." "Outside H. M. D."

Page 12

Locators: John Treadwell, R. Willoughby, M. W.
Murry, D. R. Price.

Date: May 5, 1885.

Filed and recorded: June 18, 1885.

Claim: 10,000 inches of Squaw Creek.

Place of intended use: Admiralty Mining Co. min-
ing locations.

[In margins:] "Omitted." "Outside H. M. D."

Locators: A. T. Lewis and Henry States.

“Located”: June 26, 1885.

Filed and recorded: June 26, 1885.

Claim: 15,000 inches of water of Gold Creek.

Locator: Andrew T. Lewis.

Date: June 27, 1885.

Filed and recorded: June 27, 1885.

Claim: 1500 miners inches of waters of Silver
Creek. [2187]

Locators: S. McMahon and O. Price.

Date: July 31, 1885.

Filed and recorded: Aug. 11, 1885.

Claim: 1000 miners inches of water of Mineral
Creek.

Place of intended use: “To where required.”

[In margins:] “Omitted.” “Outside H. M. D.”

Locators: S. McMahon and O. Price.

Date: July 31, 1885.

Filed and recorded: Aug. 11, 1885.

Claim: 500 miner inches of water of Deer Creek.

[In margins:] “Omitted.” “Outside H. M. D.”

Locator: D. R. Price.

"Located": July 12, 1885.

Filed and recorded: Aug. 15, 1885.

Claim: 10,000 of stream called Lake Creek.

Place of intended use: Harold and Snow Storm
Mining Location on Ad-
miralty Island and five
miles North West of the
Admiralty Mining Co.
location.

[In margins:] "Omitted." "Outside H. M. D."

Locator: D. R. Price.

Date: July 18, 1885.

Filed and recorded: Aug. 15, 1885.

Claim: 10,000 inches of Deer Creek.

Place of intended use: Morning Star and Evening
Star Mining Claim situ-
ated on Admiralty Is-
land, and six thousand
feet South East of the
Virginia Mining Claim.

[In margins:] "Omitted." "Outside H. M. D."

Locators: John G. Smith and J. G. Heid.

Date: July 30, 1885.

Filed and recorded: Aug. 18, 1885.

Claim: 150 inches of water of a certain creek which empties into Stephen's Straits upon Douglas Island on the Southern side thereof.

Place of intended use: Canal View and Sun Down Lodes. [2188]

Date: August 24, 1885.

Filed and recorded: Aug. 24, 1885.

Posted: Aug. 24, 1885.

Claim: 2000 miners inches of water from Gold Creek.

Place of intended use: Gold Creek Tunnel Mill Site.

Locators: A. T. Ellis, Jas. G. Smith, J. G. Heid.

Date: Aug. 14, 1885.

Filed and recorded: Aug. 26, 1885.

Claim: 150 inches of water of a certain creek emptying into Stephen's straights and situated upon Douglas Island upon the Southern side thereof.

Place of intended use: "White Eagle" and "Belle of the Rink" Lodes.

Locators: A. T. Ellis, Jas. G. Smith and J. G. Heid.

Date: Aug. 14, 1885.

Filed and recorded: Aug. 26, 1885.

Claim: 150 inches of water of a certain creek emptying into Stephen's Straits and situated upon Douglas Island on the Southern side thereof.

Place of intended use: The "White Eagle" and "Belle of the Rink" Lodes.

Locators: A. T. Ellis, Jas. G. Smith and J. G. Heid.

Date: Aug. 13, 1885.

Filed and recorded: Aug. 26, 1885.

Claim: 150 inches of water of a certain creek emptying into Stephen's Straits and situated upon Douglas Island, upon the Southern side thereof.

Place of intended use: The "White Eagle" and "Belle of the Rink" Lodes.

Locator: G. W. Pickett.

"Located" Aug. 25, 1885.

Filed and recorded: Aug. 27, 1885.

Claim: "All of the water of this creek with all its branches and tributaries for mining and milling" purposes. [2189]

Page 28

Locators: Marion Thomas, George Mason and D. R.

Price.

Date: Aug. 30, 1885.

Filed and recorded: Sept. 2, 1885.

Claim: All water running in Thomas Creek.

Place of intended use: Black Mariah and adjoining
clames.

[In margins:] "Omitted." "Outside H. M. D."

Page 29

Locators: M. Thomas, George Mason and D. R.

Price.

Date: Aug. 30, 1885.

Filed and recorded: Sept. 2, 1885.

Claim: All the water running in School Girl Creek.

Place of intended use: Black Dimond and adjoin-
clames.

[In margins:] "Omitted." "Outside H. M. D."

Page 30

Locators: M. Thomas, George Mason and D. R.

Price.

Date: Aug. 30, 1885.

Filed and recorded: Sept. 2, 1885.

Claim: All the water running in Rappid Creek.

Place of intended use: Black Mariah Mining Claim
and adjoining claims.

[In margins:] "Omitted." "Outside H. M. D."

Locator: Miles Calhune Davis.

Date omitted.

Filed and recorded: Oct. 3, 1885.

Claim: "Water *rite* in Silver Basin, Alaskan Territory and its tribuays, comprising two thousand inches of water in the aforesaid Described Creek for mining purposes."

[In margins:] "Omitted." "Outside H. M. D."

Locators: E. S. Flint, J. S. McMahon, L. Harrod and O. Price.

Date: Sept. 22, 1885.

Filed and recorded: Sept. 20, 1885.

Posted: Sept. 2, 1885.

Claim: All the water of Admiralty Creek, Mineral Park Mining District, Territory of Alaska.

Place of intended use: Locators' mines on Mt. Ophir.

[In margins:] "Omitted." "Outside H. M. D."

[2190]

Locators: Frank Mahony, M. McMahon, David Flannery and Thos. Keirnon.

Date omitted.

Filed and recorded: Sept. 2, 1885.

Claim: 1500 inches of water on Fall Creek, "Cross Sound," Alaska.

[In margins:] "Omitted." "Outside H. M. D."

Locators: E. S. Flint, L. Harrod, J. McMann, and
O. Price.

Date omitted.

Filed and recorded: Sept. 20, —.

Posted: Sept. 10, 1885.

Claim: All the water in creek to be known as
Crooked Creek.

Place of intended use: Locators' mines on "Mt.
Opir."

[In margins:] "Omitted." "Outside H. M. D."

Locators: A. T. Ellis, J. G. Heid and J. G. Smith.

Date: Nov. 25, 1885

Filed and recorded: Nov. 25, 1885.

Claim: 200 inches of water from a stream that
empties into Lynn Canal about twelve
miles North of St. Mary's Point, Berners
Bay.

Place of intended use: Awful Lode Mining Claim.

[In margins:] "Omitted." "Outside H. M. D."

Locators: A. T. Ellis, J. G. Heid and J. G. Smith.

Date: Nov. 25, 1885

Filed and recorded: Nov. 25, 1885.

Posted: Oct. 5, 1885.

Claim: 75 inches of water from a stream that
empties into Lynn Canal about twelve
miles North of St. Mary's Point, Berners
Bay.

Place of intended use: Awful Lode Mining Claim.

[In margins:] "Omitted." "Outside H. M. D."

Locators: A. T. Ellis, J. G. Heid and J. G. Smith.

Date: Nov. 25, 1885

Filed and recorded: Nov. 25, 1885.

Posted: Sept. 14, 1885.

[2191]

Claim: 200 inches of water from a stream that empties into Lynn Canal about twelve miles North of St. Mary's Point, Berners Bay.

Place of intended use: Awful Lode Mining Claim.

[In margins:] "Omitted." "Outside H. M. D."

Locators: A. T. Ellis, J. G. Heid and J. G. Smith.

Date: Nov. 25, 1885

Filed and recorded: Nov. 25, 1885.

Posted: Sept. 12, 1885.

Claim: 100 inches of water from a stream that empties into Lynn Canal about twelve miles N. of St. Mary's Point, Berners Bay.

Place of intended use: Awful Lode Mining Claim.

[In margins:] "Omitted." "Outside H. M. D."

Page 41

Locators: A. T. Ellis, J. G. Heid and J. G. Smith.

Date: Nov. 25, 1885

Filed and recorded: Nov. 25, 1885.

Posted: Sept. 14, 1885.

Claim: 100 inches of water from a stream that
empties into Lynn Canal about 12 miles
North of St. Mary's Point, Berners Bay.

Place of intended use: Awful Lode Mining Claim.

[In margins:] "Omitted." "Outside H. M. D."

Page 42

Locators: A. T. Ellis, J. G. Heid and J. G. Smith.

Date: Nov. 25, 1885

Filed and recorded: Nov. 25, 1885.

Posted: October 7th, 1885.

Claim: 300 inches of water from stream that empties
into Lynn Canal about twelve miles North
of St. Marys Point, Berners Bay.

Place of intended use: Awful Lode Mining Claim.

[In margins:] "Omitted." "Outside H. M. D."

Page 54

Locator: W. M. Bennett.

Date: June 11, 1886.

Filed and recorded: June 19, 1886. [2192]

Claim: 1000 inches of water from said stream (Gold
Creek).

Place of intended use: Ridge lying immediately
North of what is some-
times called Granite
Creek.

Locator: J. A. Johnson.

Date: June 28, 1886.

Filed and recorded: June 28, 1886.

Claim: Entire volume of Gold Creek at a point $2\frac{1}{4}$ miles up the Creek from Gastineaux Channel at the big falls.

Place of intended use: Johnson Mill Site.

Locator: William Lawson.

Date: July 7, 1886.

Filed and recorded: July 7, 1886.

Claim: 400 inches of water from Bear Creek, Douglas Creek, Douglas Island.

Locator: J. A. Johnson.

Date: July 14, 1886.

Filed and recorded: July 14, 1886.

Claim: Reservoir and water power location on Gold Creek at a point about two and a half miles from the Town of Juneau.

Place of intended use: Johnson Mill and Mining Company's mill site.

[In margin:] "Omitted."

Page 59

Locators: Frank Mahony and George Beaumont.

Date: July 18, 1886.

Filed and recorded: July 23, 1886.

Claim: 400 inches of water from second creek N. W.
from Bear Creek on Douglas Island.

Place of intended use: Albion & Great Western
Quartz locations.

[2193]

Page 60

Locator: R. G. Willoughby.

Date: July 15, 1886.

Filed and recorded: Aug. 9, 1886.

Claim: All the water of Canyon Creek.

Place of intended use: Silver Dick and Little Jennie
Lodes.

[In margin]: "Omitted." [2193]

Page 60

Locators: Richard Johnson and David R. Price.

Date: June 31, 1886.

Filed and recorded: Aug. 9, 1886.

Claim: all the water of stream to be known as Light-
ning Creek, situated at N. W. end of Ber-
ners Bay.

[In margins:] "Omitted." "Outside H. M. D."

Locator: B. F. Nowell.

Date: Sept. 20, 1886.

Filed and recorded: Sept. 21, 1886.

Posted: Sept. 20, 1886.

Claim: 500 inches of water of Grant Creek, Douglas Island.

Place of intended use: Cleveland, Hendricks and other lode mining claims.

Locator: B. F. Nowell.

Date: Sept. 20, 1886.

Filed and recorded: Sept. 21, 1886.

Posted: Sept. 20, 1886.

Claim: 500 inches of water of Right hand fork of Grant Creek, Douglas Island.

Place of intended use: Cleveland, Hendricks and other lode mining claims.

Locators: A. T. Ellis, J. G. Heid and J. G. Smith.

Date omitted.

Filed and recorded: Oct. 12, 1886.

Posted: Aug. 20, 1886.

Claim: 100 inches of water from East fork of Park Creek.

Place of intended use: Republican placer and other mining claims.

[In margins:] "Omitted." "Outside Dist."

Locators: A. T. Ellis, J. G. Heid, and J. G. Smith.

Date omitted.

Filed and recorded: Oct. 12, 1886.

[2194]

Posted: Aug. 20, 1886.

Claim: 50 inches of water form first tributary of the
East fork of Park Creek.

Place of intended use: Republican placer and other
mining claims.

[In margins:] "Omitted." "Outside Dist."

Locators: A. T. Ellis, J. G. Heid and J. G. Smith.

Date omitted.

Posted: Aug. 20, 1886.

Filed and recorded: Oct. 12, 1886.

Claim: 25 inches of water from second tributary
South of the East fork of Park Creek.

Place of intended use: Republican placer and other
mining claims.

[In margins:] "Omitted." "Outside Dist."

Locators: A. T. Ellis, J. G. Heid and J. G. Smith.

Date omitted.

Filed and recorded: Oct. 12, 1886.

Posted: July 26, 1886.

Claim: 100 inches of water from first tributary of
East fork of Park Creek North of sd East
fork.

Place of intended use: Republican placer and other
mining claims.

[In margins:] "Omitted." "Outside Dist."

Locators: A. T. Ellis, J. G. Heid and J. G. Smith.

Date omitted.

Filed and recorded: Oct. 12, 1886.

Posted: Aug. 20, 1886.

Claim: 50 inches of water from creek known as the
fourth tributary of the East fork of Park
Creek South of sd East fork.

Place of intended use: Republican placer and other
mining claims.

[In margins:] "Omitted." "Outside Dist."

Locators: A. T. Ellis, J. G. Heid and J. G. Smith.

Date omitted.

Posted: Aug. 20, 1886. [2195]

"Located" Oct. 4, 1890.

Filed and recorded: Oct. 6, 1890.

Claim: 1000 inches of water of Summit Creek, some-
times called John Dixes Creek.

[In margins:] "Omitted." "Outside Dist."

Locators: Jno. McCormick and Angus McDonald.

Date: Sept. 26, 1890.

Filed and recorded: Oct 7, 1890.

Claim: 600 inches of water of Montana Creek.

Place of intended use: Old Fog Placer Claim.

[In margins:] "Omitted." "Outside Dist."

Page 105

Locators: Joseph Demosthenes, George Kyrage,
Peter Komontaros, Charles Bonteros
and Christ Bozarros.

“Located” Sept. 1, 1890.

Filed and recorded: Oct. 22, 1890.

Claim: 500 miners inches of water of Taharak
Creek.

Place of intended use: Berner Bay Placer Claims
Nos. 1 and 2.

[In margins:] “Omitted.” “Outside Dist.”

Page 106

Locators: Joseph Demosthenis, Christi Boyani,
George Kyrage, Charles Bontaros and
Peter Comontaros.

“Located” Sept. 1, 1890.

Filed and recorded: Oct. 22, 1890.

Claim: 1000 inches of water of Great Falls Creek.

Place of intended use: Berners Bay Placer Mining
Claims Nos. 1 and 2.

[In margins:] “Omitted.” “Outside Dist.”

Page 118

Locators: A. K. Delaney and A. T. Anderson.

Filed and recorded: Sept. 30, 1890.

Posted: Sept. 30, 1890.

Claim: 700 inches of water of Sheep Creek.

Place of intended use: Silver Queen and Hartford
lode clms.

Locator: Fred Nicho.

“Located” April 20, 1890.

Filed and recorded: Nov. 5, 1890.

Claim: 5000 inches of water of Ocean Wave Creek.

[In margins:] “Omitted.” “Outside Dist.”
[2196]

Locators: Karl Koehler, C. S. Johnson and L. L.
Williams.

Date: Mar. 15, 1891.

Filed and recorded: Mar. 24, 1891.

Claim: 2500 inches of Spruce Creek.

Place of intended use: Upper Basin Placer Claim.

[In margins:] “Omitted.” “Outside Dist.”

Locators: Karl Koehler, C. S. Johnson and L. L.
Williams.

Date: Mar. 15, 1891.

Filed and recorded: Mar. 24, 1891.

Claim: 2000 inches of water of Spruce Creek.

Place of intended use: Uncle Sam Basin Placer
Claim.

[In margins:] “Omitted.” “Outside Dist.”

Locator: Frank B. Corwin.

"Located" Mar. 11, 1891.

Filed and recorded: Mar. 24, 1891.

Claim: 1000 inches of water of Spruce Creek.

Place of intended use: Summit Placer Location.

Locators: Alf Johnson, Seivert Anderson and Henry Olsen.

Date: May 9, 1891.

Original notice posted on ground dated May 5, 1891.

Filed and recorded: May 9, 1891.

Claim: 1000 inches of water from Nevada Creek.

Place of intended use: Tanner Placer Claim, Douglas Island.

Locator: Dr. F. Schultz.

Date: May 15, 1891.

Filed and recorded: May 15, 1891.

Claim: 20 inches of water running in Ophir Gulch Stream.

Place of intended use: Bismarck Lode Claim.

[In margins:] "Omitted." "Outside Dist."

[2197]

Locator: Dr. F. Schultz.

Date: May 15, 1891.

Filed and recorded: May 15, 1891.

Claim: 15 inches of Gulch Stream which is about
sixty feet from Ophir Gulch.

Place of intended use: Bismarck Lode Claim.

[In margins:] "Omitted." "Outside Dist."

Locator: C. S. Johnson, L. L. Williams and K.
Koehler.

Date: May 21, 1891.

Filed and recorded: June 1, 1891.

Claim: 500 inches of water of Cascade Creek.

Place of intended use: Hope, Luck and Enterprise
Placer Claims.

[In margins:] "Omitted." "Outside Dist."

Locator: C. S. Johnson, L. L. Williams and K.
Koehler.

Date: May 21, 1891.

Filed and recorded: June 1, 1891.

Claim: 500 miners inches of Gulch Creek.

Place of intended use: Hope, Luck and Enterprise
Placer Claims.

[In margins:] "Omitted." "Outside Dist."

Locator: A. M. Noyes.

"Located" May 28, 1891.

Filed and recorded: June 25, 1891.

Claim: 100 inches of water of Sheep Creek.

Place of intended use: Glacier Lode Claim.

Locators: O. Price, P. Conniff and J. Paton.

Date: May 28, 1891.

Filed and recorded: June 26, 1891.

Claim: 2000 miners' inches of water from Robbins
Creek in Sumdum Bay.

Place of intended use: Wonder Lode Claims.

[In margins:] "Omitted." "Outside Dist."

[2198]

Locators: Sylvester McMahon and Matt McMahon.

"Located" June 24, 1891.

Filed and recorded: July 26, 1891.

Claim: All the waters of Canyon Creek.

Place of intended use: Blue Wing Mine.

[In margins:] "Omitted." "Outside Dist."

Locator: R. F. Lewis.

"Located" July 19, 1891.

Filed and recorded: July 24, 1891.

Claim: 500 inches of water of upper right hand fork
of McGinnis Creek.

Place of intended use: Congress Mining Company's
lode and placer claims.

Locators: James Galligan and Barney Galligan.

Date: July 20, 1891.

Filed and recorded: July 25, 1891.

Claim: 100 miners inches of tributaries of Ice Gulch
on the left hand side going up from Quartz
Gulch, Silver Bow Basin.

Place of intended use: Galligan Placer Claim.

Locators: W. A. Sanders, Christ Bozones, Charley
Rontesos, Joseph Demosthenes, Peter
Komontoros and George Kyrage.

Date: July 27, 1891.

Filed and recorded: Aug. 11, 1891.

Claim: 500 miners inches of water of Montana
Creek.

Place of intended use: Berner Bay No. 1 and No. 2,
Placer Claims; also Uani-
more, Tuhanuck and other
lodes.

[In margins:] "Omitted." "Outside Dist."

Locators: S. J. Mills and James E. Woods.

Date: Aug. 10, 1891.

Filed and recorded: Aug. 26, 1891.

Claim: 800 miners inches of water of Windfall
Creek.

Place of intended use: placer claims on Montana
Creek.

[In margins:] "Omitted." "Outside Dist."

Locators: Koehler & Williams.

Date: Sept, 3, 1891.

Filed and recorded: Sept. 7, 1891.

Claim: 800 miners inches of water of Montana Creek.

Place of intended use: Woods, Mills, Williams and
Koehler Placer Claims.

[In margins:] "Omitted." "Outside Dist."

Locators: John G. Peterson and Crist Fuhr.

"Located" Aug. 27, 1891.

Filed and recorded: Sept, 8, 1891.

Claim: 1000 inches of water of Grindstone Creek,
tributary to Takow Inlet.

Locator: Karl Koehler.

Date: Sept. 12, 1891.

Filed and recorded: Sept. 17, 1891.

Claim: 800 miners inches of water of Slate Creek.

Place of intended use: Woods, Mills, Williams and
Koehlers Placer Claims
on Montana Creek.

[In margins:] "Omitted." "Outside Dist."

Locators: Edward Webster and W. A. Sanders.

"Located" Sept. 18, 1891.

Filed and recorded: Sept. 22, 1891.

Claim: All water flowing in Gold Creek at a point
on the North Bank upon the Webster Mill
Site.

Place of intended use: Webster Stamp Mill and Dam.

Locator: George Tate.

"Located" Oct. 10, 1891.

Filed and recorded: Oct. 16, 1891.

Claim: 1500 miners inches of Silver Creek (some-
times called Bear Creek).

Place of intended use: Good Luck and Bear Placer
Claims.

[In margins:] "Omitted." "Outside Dist."

[2200]

Locator: Wm. J. Henning.

"Located" Oct. 20, 1891.

Filed and recorded: Oct. 22, 1891.

Claim: 1000 inches of water from Granite Creek.

Place of intended use: Hill Claim opposite Coult-
er's Mill.

Locators: George Harkrader and Henry States.

Date omitted.

Filed and recorded: Oct. 28, 1891.

Claim: 1000 inches of water of Idaho Gulch.

Place of intended use: Buckeye Quartz Lodes No.
1 and 2.

[In margins:] "Omitted." "Outside Dist."

Locator: Wm. M. Ebner, agt. Eastern Alaska Mining & Milling Co.

Date: Dec, 1, 1891.

Posted: Nov. 27, 1891.

Filed and recorded: Dec. 8, 1891.

Claim: 1500 miners inches of water of Gold Creek.

Place of intended use: Eastern Alaska Mining and
Milling Company.

Locator: Winthrop W. Fisk.

Date: Oct. 22, 1891.

Filed and recorded: April 5, 1892.

Claim: 500 miners inches of water of Bear Creek.

Place of intended use: Binder Lode.

Locator: Louis Nadeau, Jr.

Date: April 20, 1892.

Filed and recorded: April 29, 1892.

Claim: 3000 inches of water of Fall Creek.

[In margins:] "Omitted." "Outside Dist."

Locators: Peter Jenson, John Schultz, Alex Thompson and Frank Baker.

Date: May 14, 1892.

Filed and recorded: May 21, 1892.

Claim: Body of water called Windfall Creek, Admiralty Island.

[In margins:] "Omitted." "Outside Dist."

Locators: R. Willoughby, A. Wair and C. Krogh.

Date: June 1, 1892.

Filed and recorded: June 10, 1892.

Claim: All the water of King Creek.

Place of intended use: Mountain King Group of gold mines, about two miles Southeast of Funter Bay, Admiralty Island.

[In margins:] "Omitted." "Outside Dist."

Locator: The Nowell Lode Mining Co. by Fred'k D. Nowell, attorney in fact.

Date: July 5, 1892.

Posted: July 5, 1892.

Filed and recorded: July 15, 1892.

Claim: 1000 inches of water of Granite Creek.

Place of intended use: Silver Bow Basin Placer mines.

Locator: The Nowell Gold Mining Co. by F. D.
Nowell, agent.

Date: Sept. 1, 1892.

Posted: Sept. 1, 1892.

Filed and recorded: Oct. 6, 1892.

Claim: 2000 miners inches of water from Gold Creek.

Place of intended use: Nowell Gold Mining Co's
20 stamp mill.

Locators: T. H. Pearman, W. J. Best, Wm. Bar-
bridge and B. Cole.

Date: April 18, 1893.

Filed and recorded: April 20, 1893.

Claim: All water on South East fork of Bear Creek
from what is known as Jade lead to the
source of the creek and from the Jade Lead
to the forks on Bear Creek.

[In margins:] "Omitted." "Outside Dist."

[2202]

Locator: Archibald Campbell.

Date: May 19, 1893.

Filed and recorded: May 19, 1893.

Claim: 200 inches of water of Ice Gulch, also all of
the water of Beaudreau Gulch and all
other side water on line of ditch.

Place of intended use: Fuller 1st lode claim.

Locator: The Alaska Prospecting and Improvement
Company by J. H. Cryder and Thomas
Douglas, agents.

Date omitted.

Filed and recorded: May 24, 1893.

Claim: 1000 inches of water of Grind Stone Creek.

Locator: Sanford J. Mills.

Date: May 15, 1893.

Filed and recorded: May 26, 1893.

Claim: 500 miners inches of water of Windfall Creek.

Place of intended use: Claim located by above
locator.

[In margins:] "Omitted." "Outside Dist."

Locators: James McDonald and William Gilbert.

Date: May 24, 1893.

Filed and recorded: June 3, 1893.

Claim: 500 miners inches of water from Rine Creek
on Takow Inlet.

Place of Intended use: Morning Sun Lode Claim
No. 2.

Locator: William M. Ebner.

Date: May 29, 1893.

Posted: May 23, 1893.

Filed and recorded: June 14, 1903.

Claim: 1000 miners inches of water from Gold Creek.

Place of intended use: Power House about 300 feet
Southwesterly from Basin
Road.

[2203]

Locator: Juneau Mining and Mangfg. Co., by Will-
iam M. Ebner, Gen. Supt.

Date: June 19, 1893.

Posted: June 17, 1893.

Filed and recorded: June 19, 1893.

Claim: 500 inches of water from Ground Hog Gulch
stream.

Place of intended use: Rim Rock Hole Claim.

Locators: W. A. Frank, E. F. Schumacher, S. B.
Robbins and W. F. Reed.

Date: June 5, 1893.

Filed and recorded: June 21, 1893.

Claim: 3000 inches of water of Robbin Creek.

Place of intended use: Bald Eagle Mill Site.

[In margins:] "Omitted." "Outside Dist."

Locators: W. F. Reed, S. B. Robbins, W. A. Frank
and E. F. Schumacher.

Date: June 5, 1893.

Filed and recorded: June 21, 1893.

Claim: 3000 inches of water of Robbins Creek.

Place of intended use: The Tennessee Mill Site.

[In margins:] "Omitted." "Outside Dist."

Locator: Oliver Price.

Date: June 4, 1893.

Filed and recorded: July 13, 1893.

Claim: 1000 miners inches of water of Jumpoff
Creek, Sumdum Bay.

Place of intended use: Up-and-down Lead.

[In margins:] "Omitted." "Outside Dist."

Locator: F. Kane, James Best, Thomas Pearman,
B. Cole and Wm. Barbridge.

Date: July 17, 1893.

Filed and recorded: July 20, 1893.

Claim: 1000 miners inches of water from West fork
of Bear Creek on Admiralty Island,
Alaska.

[In margins:] "Omitted." "Outside Dist."

Locators: F. S. Reynolds and A. T. Anderson.

Date: March 2, 1889.

Filed and recorded: Mar. 12, 1889.

Claim: All the water of Sheep Creek crossing Locator's mill site.

Place of intended use: Said mill site.

Amended Location.

Locator: J. H. Burfiend.

Date: April 6, 1889.

Filed and recorded. April 9, 1889.

Claim: 10,000 inches of water of Lemon Creek.

Locators: Jas. Johnson, "for the company."

Date: April 9, 1889.

Filed and recorded: April 12, 1889.

Claim: Water of gulch which runs into Gastineaux Channel about two thirds mile Northwest of Sheep Creek, to be known as Spring Gulch.

Place of intended use: Belcher and Golden Currier Mill Sites.

Locator: Jas. Johnson, "for the company."

Date: April 9, 1889.

Filed and recorded: April 12, 1889.

Claim: 1000 inches of water of South fork of Sheep Creek.

Place of intended use: Mill Site located and recorded
in favor of the Johnson
Group of Quartz Mining
Locations situated at
Sheep Creek.

Locators: A. Hew Gamel, John F. Mahoney, Charles
Forrest and Pat McGlinchy.

Date: April 15, 1889.

Filed and recorded: April 16, 1889.

Claim: 5000 inches of water of Salmon Creek.

[2205]

Locators: A. Hew Gamel, John G. Malony, Charles
Forrest and Pat McGlinchy.

Date: April 15, 1889.

Filed and recorded: April 22, 1889.

Claim: 6000 inches of water of Lemon Creek.

Locators: A. Hew Gamel, John G. Malony, Charles
Forrest and Pat McGlinchy.

Date: April 21, 1889.

Filed and recorded: April 22, 1889.

Claim: 6000 inches of water of Lemon Creek.

Locator: Mrs. B. Levy.

Date omitted.

Filed and recorded: April 23, 1889.

Claim: 500 inches of water of Fall Creek, Dundas Bay, Cross Sound.

[In margins:] "Omitted." "Outside Dist."

Amended location.

Locators: Sam Howarth and Van Buren.

Date: April 19, 1889.

Filed and recorded: April 27, 1889.

Claim: 5000 inches of water of Salmon Creek.

Place of intended use: Three fourths of one mile
from the point of diver-
sion toward the beach on
Gastineaux Channel on
the Northern side
thereof the point of di-
version being about 550
feet above the first forks
on said Salmon Creek.

Locator: H. S. Wyman.

Date: April 29, 1889.

Filed and recorded: May 1, 1889.

Claim: 500 inches of water of Gold Creek. [2206]

Locator: J. D. Sagemiller.

Date: May 23, 1889.

Filed and recorded: June 3, 1889.

Claim: 500 inches of water "in this Gulch or Ravine," "situated in W. N. Westerly direction & about three quarter of a mile from our house on this bank of Three River and about three miles above the head of Berners Bay.

Place of intended use: Golden Crown and Uncle Sam Mines.

[In margins:] "Omitted." "Outside Dist."

Locator: J. D. Sagemiller.

Date: May 22, 1889.

Filed and recorded: June 3, 1889.

Claim: 500 inches of water in "this ravine," "situated about three quarters of a mile from our house on the bank Three River in a W. South Westerly course or direction, about three miles from the Head of Berners Bay."

Place of intended use: Golden Crown and Uncle Sam Mines.

[In margins:] "Omitted." "Outside Dist."

Locator: Frank H. Nowell.

Date: July 11, 1889.

Filed and recorded: July 15, 1889.

Claim: 1500 inches of water of Granite Creek.

Place of intended use: Placer claim originally owned by Robert Dunn and Evan Williams; also that placer claim located by Wm. Nelson, Frank Cockburn, Evan Williams, Robert Dunn and Frank H. Nowell; also those certain creek placer claims known as the Discovery Creek Claims of Silver Bow Basin; also those certain creek placer claims originally owned by Pascal Charlot; also those creek claims located by Henry Coon, D. Campbell and Daniel Greer.

Locator: Frank H. Nowell.

“Located” July 20, 1889.

Filed and recorded: July 23, 1889.

Claim: 2000 inches of water of Gold Creek.

Place of intended use: Charlotte Placer ground &c.

[2207]

Locator: Luke Noland.

Date: July 29, 1889.

Filed and recorded: Aug. 12, 1889.

Claim: All the water of a gulch or ravine being one
of the tributaries of Snow Slide Gulch on
S. E. side thereof.

Place of intended use: Luke Noland claims.

Locator: Luke Noland.

Date: Sept. 2, 1889.

Filed and recorded: Sept. 2, 1889.

Claim: 150 inches of water from S. E. fork and 100
inches of water from middle fork of Snow
Slide Gulch.

Place of intended use: Locator's placer ground sit-
uate on the Montana 1 & 2,
the California 1 & 2
and the Fuller 2, lode
claims, owned by James
Carroll.

Locator: Luke Noland.

Date: Aug. 31, 1889.

Posted: Aug. 31, 1889.

Filed and recorded: Sept. 2, 1889.

Claim: 150 inches of water of Snow Slide Gulch and tributaries.

Place of intended use: Noland placer claim, being part of the surface ground of the Fuller the second and Montana Lode Claims owned by James Carroll.

Locator: Louis Grainer, James McCauly, Angus McDonald and John L. Meyers.

Date: Aug. 31, 1889.

Filed and recorded: Sept. 5, 1889.

Claim: 100 inches of water of East fork of Alaska King Creek, situated on the South Easterly side of Snedisham Bay.

Place of intended use: Alaska King Lode Claim.

[In margins:] "Omitted." "Outside Dist."

[2208]

Locators: John L. Meyers, L. L. Thorp and Chris. Heneker.

Date: Aug. 8, 1889.

Filed and recorded: Sept. 7, 1889.

Claim: 100 inches of water of East fork of Bay View Creek, situate on the Southeasterly side of

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Snudisham Bay Bay in Harris Mining
District, Alaska.

Place of intended use: Bay View Lode Claim.

[In margins:] "Omitted." "Outside Dist."

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Locators: John L. Meyers, L. L. Thorp and Chris.
Heneker.

Date: Aug. 8, 1889.

Filed and recorded: Sept. 7, 1889.

Claim: 100 inches of water of West Fork of Bay
View Creek, situated on the South easterly
side of Snudisham Bay in Harris Mining
District, Alaska.

Place of intended use: Bay View Lode Claim.

[In margins:] "Omitted." "Outside Dist."

Page 231

Locators: John L. Meyers, L. L. Thorp and Chris.
Heneker.

Date: Aug. 8, 1889.

Filed and recorded: Sept. 7, 1889.

Claim: 100 inches of water of Middle Fork of Bay
View Creek, situated on the South Easterly
side of Snudisham Bay in Harris Mining
District, Alaska.

Place of intended use: Bay View Lode Claim.

[In margins:] "Omitted." "Outside Dist."

Locator: "for the company" by J. D. Sagemiller.

Date: Sept. 24, 1889.

Filed and recorded: Oct. 3, 1889.

Claim: 500 inches of water "running from a little lake and streams coming from a Glacier"; "situated in a Northwesterly direction from the head of Burners Bay and about three miles from the boat and canoe landing of the left hand or Northwest fork of the three rivers."

Place of intended use: Mill site of Uncle Sam Mining Company.

[In margins:] "Omitted." "Outside Dist."
[2209]

Locators: Charles Forrest, Pat McGlinchy, A. H. Gamel and J. F. Malony.

Date: Oct. 2, 1889.

Filed and recorded: Oct. 4, 1889.

Claim: 100 inches of water of Deep Gulch on the main land near Salmon Creek.

Locators: George Beaumont and Louis Levy.

Date: Sept. 15, 1889.

Filed and recorded: Oct. 4, 1889.

Claim: 2000 inches of water from Glacier Creek situated in Glacier Bay at the head of Ruby Inlet.

Place of intended use: Blue Bell and Hoonah Chief Quartz lodes.

[In margins:] "Omitted." "Outside Dist."

Locators: Louis Grainer, James McCauly, Engels
McDonald, John L. Meyers.

Date: Oct. 8, 1889.

Filed and recorded: Oct. 17, 1889.

Claim: 1000 inches of water of North East fork of
Alaska King Creek, situated on the South
East side of Snedisham Bay in Harris
Mining District, Alaska.

Place of intended use: Alaska King, California and
Nevada lodes or claims.

[In margins:] "Omitted." "Outside Dist."

Locator: Luke Noland.

Date: Sept. 20, 1889.

Filed and recorded: Oct. 21, 1889.

Claim: 250 inches of water of Ice Gulch.

Place of intended use: certain placer claims situated
on the surface of certain
lode claims known as the
Fuller 2nd, the Montana
1st and 2nd, the California
1st and 2nd. [2210]

Locators: C. F. Blackett and Tom McCully.

Date: Nov. 11, 1889.

Filed and recorded: Nov. 12, 1889.

Claim: 300 miners inches of water of Snow Slide Gulch.

Place of intended use: Hill Placer claims located
by McCully, Blackett and
Endelman on Nov. 11th,
1889.

Locators: Thos. McCully and C. S. Blackett.

"Located": Nov. 11, 1889.

Filed and recorded: Nov. 12, 1889.

Claim: 2000 miners inches of Gold Creek.

Place of intended use: "3 hill placer claims located
near Snow Slide Gulch by
the undersigned."

Locators: John McLaughlin and Richard P. Nelson.

Date: Feb. 23, 1890.

Filed and recorded: Mar. 20, 1890.

Claim: 500 inches of water of Seward Creek in Ber-
ners Bay District.

[In margins:] "Omitted." "Outside Dist."

[2211]

Water locations contained in Volume 4 (L) of Placer
and Water Rights.

Locator: Lena Peterson.

Date: May 1, 1890.

Filed and recorded: May 1, 1890.

Claim: All the rights and privileges to a certain stream flowing through lot No. 8 in the new addition to Juneau; also flowing through Lots 6 and 5 in block 114.

Locator: F. S. Reynolds.

Date: May 5, 1890.

Filed and recorded: May 13, 1890.

Claim: 1000 miners inches of Sheep Creek opposite "this notice."

Place of intended use: Silver Queen Mining Co.

Locators: Pat McGlinchy, F. J. Malony, Chas. W. Forrest and Alfred H. Gamel.

Date: May 24, 1890.

Filed and recorded: May 28, 1890.

Posted: May 24, 1890.

Claim: 1000 inches of water from Gold Creek.

Place of intended use: Fraction Lode Claim.

Locator: W. F. Reed, per S. B. R.

Date: May 17, 1890.

Filed and recorded: May 28, 1890.

Claim: 500 miners inches of water of Robbins Creek.

Place of intended use: Tennessee lode or ledge mill.

[In margins:] "Omitted." "Outside Dist."

Page 13

Locators: L. L. Williams, Karl Koehler and Joseph Goldsmith.

Date: June 3, 1890.

Filed and recorded: June 12, 1890.

Claim: 2500 inches of water of Cascade Creek.

Place of intended use: Enterprise, Hope and Luck placer claims.

[In margins:] "Omitted." "Outside Dist."

[2212]

Page 23

Locators: Crist Fuhr and S. C. Peterson.

Date: June 12, 1890.

Filed and recorded: June 23, 1890.

Claim: 1000 inches of water from the second creek on the left hand side of Takow Inlet above the first Indian Village.

[In margin:] "Omitted."

Page 24

Locators: Karl Koehler, L. L. Williams and C. S. Johnson.

Date: June 26, 1890.

Filed and recorded: June 30, 1890.

Claim: 2500 inches of water of Spruce Creek.

Place of intended use: Enterprise, Hope and Luck Placer Claims.

[In margins:] "Omitted." "Outside Dist."

Locators: Ed Aylward and Jno. McLaughlin.

Date: June 16, 1890.

Filed and recorded: July 1, 1890.

Claim: 500 inches of water in "this creek." Water right located in a Basin near the N. W. end line of the Ophir Quartz Mining Claim on the S. W. slope of Mt. Sherman in Berners Bay, District of Alaska.

[In margins:] "Omitted." "Outside Dist."

Locator: F. H. Poindexter, Supt. of the Chilcat Packing Co.

Date: July 9, 1890.

Filed and recorded: July 9, 1890.

Claim: 1000 inches of water from Chilcoot River.

Place of intended use: Chilcat Packing Co.'s flume.

[In margins:] "Omitted." "Outside Dist."

Locators: John McLaughlin and Ed Aylward.

Date: July 10, 1890.

Filed and recorded: July 16, 1890.

Claim: 2000 miners inches of Seward Creek, Berner's Bay.

[In margins:] "Omitted." "Outside Dist."

Page 58

Locators: Matt McMahon and Pastorino Rocco.

Date: July 8, 1890.

Filed and recorded: July 23, 1890.

Claim: All the water of Bolder Creek about one mile
Southeast of Sumdum Mine, Sumdum Bay,
Alaska.

Place of intended use: Sumdum Mine.

[In margins:] "Omitted." "Outside Dist."

Page 59

Locators: Matt McMahon and Pastorino Rocco.

Date: July 8, 1890.

Filed and recorded: July 23, 1890.

Claim: All the water of Fall Creek near Sumdum
Bay.

Place of intended use: Sumdum Mine.

[In margins:] "Omitted." "Outside Dist."

Page 67

Locators: S. B. Robbins, E. F. Shoemaker and W. A.
Frank.

"Located" July 25, 1890.

Filed and recorded: Aug. 25, 1890.

Claim: 3000 inches of water from South Fork of
Robbins Creek.

[In margins:] "Omitted." "Outside Dist."

Locator: W. A. Biglow.

Date: July 25, 1890.

Filed and recorded: Aug. 28, 1890.

Claim: 400 inches of water of Chilcoot River.

[In margins:] "Omitted." "Outside Dist."

Locators: George Beaumont and Wm. McLernon.

Date: Sept. 3, 1890.

Filed and recorded: Sept. 6, 1890.

Claim: All the water in that certain mountain stream running through the Mountain Torrent Lode Claim and emptying in to Sheep Creek at its head.

Place of intended use: Mountain Torrent Lode and Mountain Chief.

Locators: George Beaumont and Wm. McLernon.

Date: Sept. 3, 1890. [2214]

Filed and recorded: Sept. 6, 1890.

Claim: All the water in that certain stream running through the Mountain Monarch Lode Claim and emptying into Sheep Creek at its head.

Place of intended use: Mountain Monarch Lode Claim and the Mountain Torrent.

Locator: William Nelson.

Date: Sept. 8, 1890.

Filed and recorded: Sept. 9, 1890.

Posted: Sept. 8, 1890.

Claim: 3000 miners inches of water from Gold
Creek.

Place of intended use: Last Chance Hydraulic Min-
ing Claim.

Locators: John McWilliams, G. W. Stuke, J. B
Harmon and Jesse McWilliams.

“Located” June 1, 1890.

Filed and recorded: Sept. 23, 1890.

Claim: 1000 miners inches of water of the natural
stream flowing from the mountain just
above, over and along the located and re-
corded property of the Ohio Lode Claim.

[In margin:] “Omitted.”

Locator: K. Koehler.

Date: Sept. 19, 1890.

Filed and recorded: Sept. 24, 1890.

Claim: 3000 inches of water running in creek called
Bernwords Creek, Berners Bay Mining
District.

Place of intended use: Seward City Mining prop-
erty.

[In margins:] “Omitted.” “Outside Dist.”

Page 96

Locator: John McCormick.

Sept. 15, 1890, date.

Filed and recorded: Oct. 1, 1890.

Claim: All the water of the Northwest branch of
McInch's Creek to the extent of five hundred inches.

Place of intended use: Montana Creek Basin.

[In margins:] "Omitted." "Outside Dist."

Page 98

Locators: John F. Malony, A. H. Gamel and Pat
McClinchey. [2215]

Page 85

Locator: E. Lionel C. dela Pole; R. P. Nelson, Co-
owner.

Date: Nov. 12, 1895.

Filed and recorded: Feb. 1, 1896.

Claim: 40 miners inches of water of "Templeton
Water Right."

Page 85

Locator: E. L. C. dela Pole; R. P. Nelson, co-owner.

Date: Nov. 12, 1895.

Filed and recorded: Feb. 1, 1896.

Claim: 40 inches of "John Brown Water Right."

Locators: Patrick Evoy, Neal Ward, Willis Thorp
and John Regan.

Date: Feb. 8, 1896.

Filed and recorded: Feb. 28, 1896.

Claim: 300 inches on Regan Creek, Sheep Creek
Basin.

Place of intended use: Ready Bullion, Frac-
tion, Suzerne and Hid-
den Treasurer Quartz
Claims.

Locator: H. W. Mellen.

“Located” Mar. 11, 1896.

Filed and recorded: Mar. 16, 1896.

Claim: 1000 miners inches of water of Johnson
Creek in the Berners Bay Mining District.

Place of intended use: Mill site on the Undine Min-
ing Claim.

[In margins:] “Omitted.” “Outside Dist.”

Locators: C. S. Johnson, John G. Heid.

Located: Mar. 9, 1896.

Filed and recorded: Mar. 19, 1896.

Claim: 1500 miners inches of water of Salmon
Creek.

Place of intended use: Sea Shore of Gastineaux
Channel. [2216]

Locator: A. Murray.

Date: Mar. 24, 1896.

Filed and recorded: April 11, 1896.

Claim: 100 inches of water of Bear Creek.

Place of intended use: Douglas City, "for fire and
culenary purposes."

Locator: The Nowell Gold Mining Co., by Fredk.
D. Nowell, Agent.

"Located" April 18, 1896.

Filed and recorded: April 18, 1896.

Claim: 1000 miners inches of water of Sheep Creek.

Place of intended use: Nowell Gold Mining Co.'s
claims.

Locators: William Gilbert and Louis Steen.

Date omitted.

Filed and recorded: April 27, 1896.

Claim: 600 inches of water from Rine Creek, "situ-
ated $\frac{3}{4}$ of a mile to the Westward of Point
Bishop in Harrison Mining District."

Place of intended use: Yellow Jacket Lode.

Locator: Willis Sharp.

Date: April 30, 1896.

Filed and recorded: May 1, 1896.

Claim: 500 inches of water of "this stream."

Place of intended use: Locator's Electric Plant on
Gold Creek near Auk Vil-
lage.

Locators: John Y. Ostrander and G. W. F. John-
son.

Date: April 28, 1896.

Filed and recorded: May 4, 1896.

Claim: 1500 inches of water of Salmon Creek.

Place of intended use: About one fourth miles from
the Eastern shore of Gas-
tineaux Channel.

[2217]

Locators: Robert Duncan, Jr. F. D. Nowell and J.
F. Malony.

Date: May 6, 1896.

Filed and recorded: May 6, 1896.

Claim: All the water in that certain spring immedi-
ately North of Gold Creek near the Bridge
crossing said creek about a quarter of a
mile above the mouth.

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Page 97

Locators: Robert Duncan, Jr., J. P. Corbus, A. W.
Corbus and John F. Maloney.

Date: May 16, 1896.

Filed and recorded: May 20, 1896.

Claim: 5000 inches of waters of Gold Creek.

Place of intended use: Power house on beach near
mouth of Gold Creek.

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Locators: Robert Duncan, Jr., J. P. Corbus, A. W.
Corbus and John F. Maloney.

Date: May 16, 1896.

Filed and recorded: May 20, 1896.

Claim: 5000 inches of water of Gold Creek.

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Locators: R. Willoughby and R. Johnson.

Date: May 19, 1896.

Filed and recorded: May 21, 1896.

Claim: All the water of "Saw Mill Creek on the
East or South East side of Bernards Bay,
Territory of Alaska."

Place of intended use: Black Maria group of quartz
mines.

[In margins:] "Omitted." "Outside Dist."

Locator: John S. Seatter.

Date: June 1, 1896.

Posted: June 2, 1896.

Filed and recorded: June 10, 1896.

Claim: 100 miners inches of water from each of Bald
Mountain Streams Nos. 1 and 2.

Place of intended use: Initial Placer Mining Claim,
Northwest of Townsite of
Juneau.

[2218]

Locator: Frank Bach.

Date: July 10, 1896.

Filed and recorded: Aug. 4, 1896.

Claim: 1000 inches of water of Independent Creek.

Place of intended use: Premises of F. Bach and his
co-owners.

[In margin:] "Omitted."

Locator: W. J. Wadleigh.

Date: Aug. 11, 1896.

Filed and recorded: Aug. 12, 1896.

Claim: 800 inches of water of Ready Bullion Creek.

Place of intended use: Beach of Gastineaux Channel.

Locator: W .J. Wadleigh.

Date: Aug. 11, 1896.

Filed and recorded: Aug. 12, 1896.

Claim: 800 miners inches of water of Bullion Creek.

Place of intended use: Beach of Gastineaux Channel.

Locator: W. J. Wadleigh.

Date: Aug. 9, 1896.

Filed and recorded: Aug. 18, 1896.

Claim: 600 miners inches of water of "Fall Creek"
Douglas Island.

Place of intended use: Some point of the beach of
Gastineaux Channel.

Amended location.

Locators: Antone Marks, Magloir Le Page, Alex
Thompson and Geo. Harkrader.

Date: Aug. 6, 1896.

Filed and recorded: Aug. 18, 1896.

Claim: 1500 inches of water from Nevada Creek,
Douglas Island.

Place of intended use: Mill site between shore of
Gastineaux Channel and a
point at the top of the
small falls of said creek
about 500 feet above the
top of the large falls.

Page 131

Locators: Jas. Loedges, Jas. Jennings and Jas.
McQuillon.

"Located" Aug. 21, 1896.

Filed and recorded: Sept. 3, 1896.

Claim: 10,000 miners inches of water running in
Saw Mill Creek and also the streams
flowing into same above or along ditch
flume site.

Place of intended use: Smuggler and Yankee Girl
Lode Claims.

[In margins:] "Omitted." "Outside Dist."

Page 132

Locator: Joseph Thomas Gilbert.

Date: Sept. 5, 1896.

Posted: Sept. 7, 1896.

Filed and recorded: Sept. 9, 1896.

Claim: 500 inches of waters of South East fork of
Sheep Creek.

Page 136

Locator: Lewis Lund.

Date: Oct. 3, 1896.

Filed and recorded: Oct. 3, 1896.

Claim: All the water of spring situated on the moun-
tain side at the head of 3rd Street in the
Town of Juneau.

[In margin:] "Omitted."

Locators: Donal Fraser, John McWilliams, C. S.
Brown and M. E. Olsen.

Date: Sept. 16, 1896.

Filed and recorded: Oct. 5, 1896.

Claim: 1000 inches of water on East branches of
Cowee Creek.

[In margin:] "Omitted."

Locator: W. I. Wadleigh.

Date: Oct. 13, 1896.

Filed and recorded: Oct. 14, 1896.

Claim: 800 miners inches of water of Ready Bullion
Creek.

Place of intended use: Beach of Gastineaux Channel.
[2220]

Locator: W. I. Wadleigh.

Date omitted.

Filed and recorded: Oct.—1896.

Claim: 600 miners inches of water of Fall Creek,
Douglas Island.

Place of intended use: Some point of the beach of
Gastineaux Channel.

Locator: W. I. Wadleigh.

Date: Oct. 13, 1896.

Filed and recorded: Oct. 14, 1896.

Claim: 800 miners inches of water of Bullion Creek.

Place of intended use: Beach of Gastineaux Channel.

Page 142

Locators: Peter Wiborg, Jno. Prior, Jno. Olds and
Thos. Smith.

“Located” Oct. 7, 1896.

Filed and recorded: Oct. 24, 1896.

Claim: 2000 inches of water of Duck Creek, which
empties into Berners Bay on the South-
east side of same.

[In margin:] “Omitted.” “Outside Dist.”

Page 142

Locators: Peter Wiborg, Thos. Smith, Jno. Prior
and Jno. Olds.

“Located” Oct. 7, 1896.

Filed and recorded: Oct. 24, 1896.

Claim: 2000 inches of water of Boulder Creek, which
empties into Berners Bay on the South
East side thereof.

[In margins:] “Omitted.” “Outside Dist.”

Page 143

Locator: Frank Boch.

“Located” Oct. 30, 1896.

Filed and recorded: Nov. 2, 1896.

Claim: 5000 inches of water of Sherman Creek,
Berners Bay Mining District.

Place of intended use: Horrible Mining & Milling
Co. Mill.

[In margins:] “Omitted.” “Outside Dist.”

[2221]

Locator: Robt. Duncan, Jr.

Date: Jan. 20, 1897.

Filed and recorded: Jan. 20, 1897.

Claim: 30,000 inches of waters of Lemon Creek.

Locator: J. P. Corbus.

Date: Jan. 20, 1897.

Filed and recorded: Jan. 20, 1897.

Claim: 30,000 inches of waters of Lemon Creek.

Locator: A. N. Corbus.

Date: Feb. 15, 1897.

Filed and recorded: Feb. 15, 1897.

Claim: 20,000 inches of water of Salmon Creek.

Locator: Louis F. Moor.

"Located" Mar. 10, 1897.

Filed and recorded: April 3, 1897.

Claim: 2000 miners inches of water of creek which
empties into "Sanford Cove, Holkham
Bay, Alaska."

[In margins:] "Omitted." "Outside Dist."

Locators: John Prior, Thos. Smith, Peter Wyborg
and John Olds.

“Located” June 13, 1897.

Filed and recorded: June 21, 1897.

Claim: 1000 miners inches of water of Boulder
Creek, situated on Southeast side of Berners Bay.

Place of intended use: Berners Bay Mining Claim.
[In margins:] “Omitted.” “Outside Dist.”

Locators: Milo Kelly, Geo. Cleveland, W. E. Williams,
Chas. Fremont and J. W. Kelly.

“Located” June 19, 1897.

Filed and recorded: June 28, 1897.

Claim: 2000 miners inches of water of creek between
Yankee Basin and Lynn Canal about two
miles from Lynn Canal.

Place of intended use: Summit and Lookout Mining Claim.

[In margins:] “Omitted.” “Outside Dist.”

[2222]

Locators: Milo Kelly, George Cleveland, W. E. Williams, Chas. Fremont and Jas. W. Kelly.

Date: June 19, 1897.

Filed and recorded: June 24, 1897.

Claim: 2000 miners inches of water of creek lying between Yankee Basin and Lynn Canal about two miles from Lynn Canal.

Place of intended use: Bonanza and Bonanza Extension Mining Claims.

[In margins:] "Omitted." "Outside Dist."

Locators: John McCroni and John Kiernan.

"Located" June 23, 1897.

Filed and recorded: July 1, 1897.

Claim: 2000 inches of water from Johnson's Creek, Berner Bay District, Alaska.

[In margins:] "Omitted." "Outside Dist."

Locators: J. McLaughlin, Sam Harvey, J. R. Clay and J. Y. Ostrander.

"Located" July 3, 1897.

Filed and recorded: July 6, 1897.

Claim: 2000 miners inches of water flowing in Salmon Creek.

Place of intended use: "Old Glory" Mill site.

Locator: Joseph T. Gilbert by Chas. W. Garside,
Agent.

Date omitted.

Posted: July 2, 1897.

Filed and recorded: July 6, 1897.

Claim: 4000 miners inches of water from Lurvy
Creek.

Place of intended use: Perseverance Mill Site.

Locators: J. B. Warner and R. B. Knapp.

Date: Aug. 29, 1897.

Filed and recorded: Sept. 2, 1897. [2223]

Claim: 100 inches of water of stream emptying into
Lynn Canal at Seward City.

Place of intended use: Ashland and Victor Lode
Claims.

[In margins:] "Omitted." "Outside Dist."

Locators: John Penella and Geo. G. Danow.

Date omitted.

Posted: Aug. 31, 1897.

Filed and recorded: Sept. 3, 1897.

Claim: 200 miners inches of water of Hartford Creek,
Berner's Bay Mining District.

Place of intended use: "Horrible" Mill Site.

[In margins:] "Omitted." "Outside Dist."

Locator: Peter Suedman.

"Located" Sept. 20, 1897.

Filed and recorded: Sept. 25, 1897.

Claim: 5000 inches of stream emptying into Lynn
Canal at a point South of and near the
mouth of Eagle River.

Place of intended use: Some point down the stream
suitable for a mill site.

[In margins:] "Omitted." "Outside Dist."

Locators: Frank Cook and L. G. Boch.

"Located" Sept. 17, 1897.

Filed and recorded: Sept. 28, 1897.

Claim: 500 inches of water in Impregnable Gulch,
Berners Bay Mining District.

Place of intended use: Ivanhoe and Ellen Mill Site.

[In margins:] "Omitted." "Outside Dist."

Locators: Frank Cook and L. G. Bock.

"Located" Sept. 17, 1897.

Filed and recorded: Sept. 28, 1897.

Claim: 3000 inches of water of Independent Creek,
Berners Bay Mining District.

[In margins:] "Omitted." "Outside Dist."

Locator: R. F. Lewis.

Date: Nov. 15, 1897.

Filed and recorded: Nov. 16, 1897. [2224]

Claim: 100 inches of waters of Gold Creek.

Place of intended use: Whitney Placer Claim and
Town of Juneau.

Locators: J. G. Davis and E. P. Pond.

"Located" Nov. 12, 1897.

Filed and recorded: Nov. 18, 1897.

Claim: 5000 miners inches of waters of Kowee Creek,
Berners Bay.

Place of intended use: California, Scotia and Per-
haps Quartz Claims.

[In margins:] "Omitted." "Outside Dist."

Locator: H. B. Runnalls.

Date: Jan. 28, 1898.

Filed and recorded: Feb. 2, 1898.

Claim: All the water rights in connection with Mill
Creek and Fall Creek.

[In margins:] "Omitted." "Outside Dist."

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Locators: W. H. Hile, by G. Waverley Keeling, Agt.

Date: Mar. 1, 1898.

Filed and recorded: Mar. 1, 1898.

Posted: Feb. 11, 1898.

Claim: 10,000 inches of water of Gold Creek.

Place of intended use: Last Chance Placer Mining
Claims.

Page 260

Locators: W. H. Hile, by Waverley Keeling, agt.

Date: Mar. 1, 1898.

Posted: Feb. 11, 1898.

Filed and recorded: Mar. 1, 1898.

Claim: 10,000 inches of water of Gold Creek.

Place of intended use: point below Last Chance
Placer Claims.

[2225]

Page 298

Locators: Frank Bach, John Shultz and Alex
Thompson.

Date: July 17, 1893.

Filed and recorded: July 20, 1893.

Claim: 5000 inches of water of Bear Creek.

Place of intended use: Homestake and Red Rose
lode claims.

[In margins:] "Omitted." "Outside Dist."

Locator: R. F. Lewis.

Date: Aug. 11, 1893.

Filed and record: Aug. 11, 1893.

Claim: All the water running from the face and mouth of a certain tunnel situated on the West Bank of Gold Creek about 1500 feet from the Northeast corner of the town site of Juneau, to be used in supplying said Town of Juneau with water.

Locator: Thomas S. Nowell.

Date: Aug. 12, 1893.

Posted: Aug. 2, 1893.

Filed and recorded: Aug. 12, 1893.

Claim: 1000 miners inches of water from Gold Creek.

Place of intended use: Alaska Chief Mill Site.

Locator: C. F. Fuehr.

Date: Sept. 23, 1893.

Filed and recorded: Sept. 25, 1893.

Claim: 600 miners inches of water on the two little streams known as the Silver Creek and Gold Creek in Seamore Channel; also 600 inches of water of Deer Creek.

[In margins:] "Omitted." "Outside Dist."

Locators: Chas. E. Coon and G. H. Church.

Date: Oct. 4, 1893.

Filed and recorded: Oct. 4, 1893.

Claim: 100 inches of water of Gold Creek.

Place of intended use: Juneau, Alaska.

[2226]

Locators: Willis Thorp and J. Al. Meier.

Date: Aug. 15, 1893.

Filed and recorded: Oct. 9, 1893.

Claim: 1000 inches of water of Branch Creek situated on South East side of Sum Dum Bay.

[In margins:] "Omitted." "Outside Dist."

Locator: Fredk. D. Nowell, atty. in fact for The
Nowell Gold Mining Co.

Date: Aug. 19, 1893.

Posted: Aug. 19, 1893.

Filed and recorded: Dec. 19, 1893.

Claim: 2000 miners inches of water from Granite
Creek.

Place of intended use: Electric Power Plant to be
located near hydraulic
flume to Silver Bow Basin.

Locator: Frank C. Hammond.

Date: April 17, 1894.

Filed and recorded: April 17, 1894.

Claim: 1000 miners inches of water from Gold Creek.

Place of intended use: Power house site about 250
feet Southwest of Basin
Road.

Locators: James P. Gorgenson, Sylvester McMahon,
Wm. Nelson, Wm. Rudolph and Edw.
Webster.

Date: April 26, 1894.

Filed and recorded: May 1, 1894.

Claim: All the waters of Salmon Creek and its trib-
utaries.

Place of intended use: Town of Juneau.

Locator: Alaska Electric Light &. Power Co. by F.
D. Kelsey, Secretary.

Date: Date: May 24, 1894.

Original notice posted on claim dated May 22, 1894.

Filed and recorded: May 25, 1894.

Claim: 500 inches of waters of Gold Creek.

Place of intended use: Chicken Ridge, Juneau,
Alaska.

Locators: Chas. E. Coon and G. H. Church.

Date: June 14, 1894.

Original notice posted on claim dated June 1, 1894.

Filed and recorded: June 14, 1894.

Claim: 500 inches of water of a mountain stream on
the South side of Gold Creek.

Place of intended use: Town of Juneau.

Locators: Anton Teljestrand, S. J. Anderson and
Oscar Larson.

“Located” June 6, 1894.

Filed and recorded: June 15, 1894.

Claim: The waters of the Snow Slide Stream.

[In margins:] “Omitted.” “Outside Dist.”

Locator: R. F. Lewis.

Date: omitted.

Filed and recorded: June 25, 1894.

Claim: 200 inches of water from Gold Creek.

Place of intended use: Aladin Placer Claim.

Amended location.

Locator: Alaska Electric Light and Power Co. by
F. D. Kelsey, Secretary.

Date: July 5, 1894.

Original notice posted on claim dated: May 22, 1894.

Filed and recorded: July 6, 1894.

Claim: 500 miners inches of water of Gold Creek.

Place of intended use: Creek placer mining claim
of Willis Thorp.

Locators: Anton Liljestrang and Alb. Ohman.

"Located" June 27, 1894.

Filed and recorded: July 7, 1894.

Claim: The water of Little Snow Slide Creek.

[In margin:] "Outside Dist."

[2228]

Locators: E. M. Lesihatos and Peter Komantoros.

"Located" June 23, 1894.

Filed and recorded July 11, 1894.

Claim: 500 inches of water of first fork of Sherman
Creek (going up stream).

Place of intended use: North Star Mill Site.

[In margins:] "Omitted." "Outside Dist."

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Locators: Anton Marks, John Shoultz, Alex Thompson and Magloire Le Page.

Date: Aug. 6, 1894.

Filed and recorded Aug. 13, 1894.

Claim: 1000 miners inches of water of Nevada Creek,
Douglas Island.

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Locator: A. W. Corbus.

Date: Oct. 7, 1894.

Filed and recorded: Oct. 18, 1894.

Claim: 1500 miners inches of water of Sheep Creek.

Place of intended use: Power house on beach near
mouth of Sheep Creek,
South West.

Page 350

Locator: David Wallace.

Date: Oct. 18, 1894.

Filed and recorded: Oct. 22, 1894.

Claim: 400 inches of water from Grouse Gulch and
Quartz Gulch.

Place of intended use: Florence and Independence
Lode Claims.

Locator: E. O. Sylvester.

“Located” Oct. 22, 1894.

Filed and recorded: Oct. 23, 1894.

Claim: 1000 miners inches of the water of Sheep
Creek.

Place of intended use: point on beach or to some
point along said creek to
factory, smelter mill, or
power house.

[2229]

Locator: A. Burns.

Date: Nov. 16, 1894.

Filed and recorded: Nov. 16, 1894.

Claim: 100 inches of water of spring or creek about
700 feet up the mountain and back of the
store building of the said A. Burns on the
water front in the Town of Juneau.

[2230]

Water locations contained in Volume 5 of Placer and
Water Rights.

Locators: Wm. Nelson, Ed. Erp, Brockhousen and
G. W. Garside.

Date omitted.

Posted: Nov. 21, 1894.

Filed and recorded: Dec. 3, 1894.

Claim: 1500 miners inches of water from Gold
Creek.

Place of intended use: Last Chance Placer Mine.

Locators: B. M. Smith and F. D. Kelsey.

Date: Dec. 15, 1894.

Filed and recorded: Dec. 18, 1894.

Claim: 2000 miners inches of water of Salmon Creek.

Place of intended use: Mill and manufacturing site
of locators.

Locators: David Fitzsimmons, Thos. Davis, Harry
Mike T. Creenan, Jas. Fitzsimmons, Ed-
ward McKim, William Delehay and
Richard Boyer.

Date: Jan. 1, 1895,

Filed and recorded: Jan. 8, 1895.

Claim: 5000 inches of water of Grindstone Creek.

Place of intended use: Great Falls Placer Claim.

Locator: S. T. Watson.

Date: Mar. 11, 1895.

Filed and recorded: Mar. 11, 1895.

Claim: 100 inches of water of "this stream."

Place of intended use: Town of Douglas City, for
purpose of water supply.

Locator: S. T. Watson.

Date: Mar. 11, 1895.

[2231]

Filed and recorded: Mar. 11, 1895.

Claim: 100 inches of water from "this stream of water and also that certain spring of water close to and connected with this stream of water."

Place of intended use: Town of Douglas City, for the purpose of water supply.

Locator: Jas. McDonald.

Date: Mar. 14, 1895,

Filed and recorded: April 8, 1895.

Claim: 1000 miners inches of water of Dugan Creek on the East side of Tahow Inlet on the East side of Harris Mining District.

Place of intended use: Yorktown Lode Claim on the West side of said creek.

[In margins:] "Omitted." "Outside Dist."

Locator: Juncau Mining Company by L. W. Shinn.

Date: May 14, 1895.

Filed and recorded: May 15, 1895.

Claim: 400 inches of water of Ice Gulch.

Place of intended use: Wedge and Fuller 1st Lode Claims, W. S. S. Lot No. 70.

Locator: Juneau Mining Co. by L. W. Shinn.

"Located" May 19, 1895.

Filed and recorded: May 20, 1895.

Claim: 300 inches of water of "this gulch and Ice
Gulch stream."

Place of intended use: Wedge and Fuller 1st, W. S.
S. Lot No. 70 Claims.

Locator: R. F. Suois.

"Located" May 29, 1895.

Filed and recorded: May 30, 1895.

Claim: 50 inches of water running down the mountain side at a point about 2100 feet above sea level and immediately above the old Carroll and Murry wharf site in the Town of Juneau.

Place of intended use: Fuller First Lode Claim, W.
S. S. Lot No. 70.

[2232]

Locator: J. G. Peterson.

Date: June 3, 1895.

"Located" May 27, 1895.

Filed and recorded: June 3, 1895.

Claim: 1000 inches of water from Glacier Creek,
which empties into Gastineaux Channel.

[In margin:] "Omitted."

Locator: Henry P. Hill.

Date: June 10, 1895.

Filed and recorded: June 10, 1895.

Claim: 100 miners inches of water of spring situated
on the North bank of Gold Creek about 25
feet distant therefrom.

Place of intended use: Lot 5, Block 31, Juneau
townsite.

Locator: G. W. Shin for the Juneau Mining Co.

Date: June 9, 1895.

Filed and recorded: June 11, 1895.

Claim: 400 inches of water from Ice Gulch and also
side water intercepted by ditch.

Place of intended use: Fuller First Lode Claim.

Locators: James Patton and James G. Smith.

Date: July 31, 1895.

Filed and recorded: July 10, 1895.

Claim: 500 inches of water of Montana Creek, in
what is sometimes called Montana Mining
District, Alaska.

Place of intended use: Pilgrimage Placer Claim.

[In margins:] "Omitted." "Outside Dist."

Locator: Berners Bay Mining and Milling Co. by
Willis G. Nowell, Supt.

Date: July 11, 1895.

Filed and recorded: July 20, 1895.

Claim: 1000 miners inches of water of Ophir Creek,
Berners Bay Mining District.

[In margins:] "Omitted." "Outside Dist."

[2233]

Locator: Berners Bay Mining and Milling Co. by
Willis E. Nowell, Supt.

"Located" July 11, 1895.

Filed and recorded: July 20, 1895.

Claim: 500 inches of water of West Ophir Creek,
Berners Bay Mining District.

[In margins:] "Omitted." "Outside Dist."

Locator: Berners Bay Mining and Milling Co. by
Willis E. Nowell, Supt.

"Located" July 11, 1895.

Filed and recorded: July 20, 1895.

Claim: 2000 miners inches of water of Sherman
Creek, Berners Bay Mining District.

[In margins:] "Omitted." "Outside Dist."

Page 61

Locators: R. P. Nelson and John McLaughlin.

Date omitted.

Filed and recorded: July 26, 1895.

Claim: 200 inches of water of Ophir Creek, Berners
Bay Mining District.

[In margins:] "Omitted." "Outside Dist."

Page 62

Locator: William C. Boyd.

Date: July 22, 1895.

Filed and recorded: Aug. 1, 1895.

Claim: 300 miners inches of water of Mineral King
Creek, the first large creek below the
Ready Bullion Creek, Douglas Island.

Page 69

Locator: Mrs. Sadie Martin.

Date: Aug. 19, 1895.

Filed and recorded: Aug. 19, 1895.

Claim: All the water flowing from a spring situated
on Lot 6, Block 37, Town of Juneau.

Place of intended use: Said Lot 6, for domestic and
other purposes.

[2234]

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Locator: Willis E. Nowell, Supt. B. B. M. & M. Co.

Date: Sept. 24, 1895.

Filed and recorded: Oct. 8, 1895.

Claim: 250 miners inches of water of West Ophir
Creek or "Impregnable Basin."

Place of intended use: Berner's Bay Mining and
Milling Co. quartz mill.

[In margins:] "Omitted." "Outside Dist."

Amended location.

Page 79

Locators: Wm. Brunn and S. A. Von Gunther.

Date: Nov. 22, 1895.

Filed and recorded: Nov. 23, 1895.

Claim: "one hundred inches of water from this
stream of water and also these certain
springs of water close to and connected
with this stream of water."

Place of intended use: Town of Douglas City, for
the purpose of water sup-
ply.

Page 80

Locator: W. I. Webster.

Date omitted.

Filed and recorded: Dec. 19, 1895.

Claim: "Volume of water, the same being seepage
and spring water perculating through the
soil and furnished by a spring situated

upon Humbolt lode claim at or near the
North West end of sd lode claim," Harris
Mining District.

Place of intended use: Webster Quartz Mill.

Page 82

Locator: William Douglas.

Date: Jan. 15, 1896.

Filed and recorded: Jan. 15, 1896.

Claim: 1000 inches of water of Cowie Creek, Harris
Mining District.

[2235]

Page 395

Locators: Frank Boch and Angus Mackay.

Date: Nov. 22, 1899.

Filed and recorded: Dec. 1, 1899.

Claim: 5000 inches of Distin Creek, which empties
into Takow Harbor at the South East end
of the head of said harbor.

Place of intended use: Jumboes and Sanders Mill
Sites.

[In margins:] "Omitted." "Outside Dist."

[2236]

Water locations contained in Volume 8 of Placer
and Water Locations.

Page 4

Locators: J. W. Price, Thomas C. Price, Charles D.
Price and Arthur Back.

Date: Jan. 5, 1900.

Filed and recorded: Jan. 6, 1900.

Claim: 2000 miners inches of water from Salmon
Creek.

Place of intended use: Town of Juneau for domestic
purposes, &c.

Page 7

Locator: P. S. Early.

Date: Jan. 1, 1900.

Filed and recorded: Jan. 18, 1900.

Claim: 5000 cubic inches of water per second of time
from Kowie Creek.

Place of intended use: Mill Site about 7 miles
Southeast of Berners Bay
on Kowie Creek.

[In margins:] "Omitted." "Outside Dist."

Locator: P. S. Early.

Date: Jan. 1, 1900.

Filed and recorded: Jan. 18, 1900.

Claim: 1000 cubic inches per second of time of water
running in "this stream."

Place of intended use: "Mill sight at forks of
Kowie Creek at the foot of
Yankee Basin Mountain"
about 8 miles Southeast of
Berners Bay.

[In margins:] "Omitted." "Outside Dist."

Locators: Oscar Ohman, Anton Lilstrand and Oscar
Larson.

Date: Feb. 5, 1900.

Filed and recorded: Feb. 6, 1900.

Claim: "This stream of water called the Snow Slide
Creek."

[In margin:] "Outside Dist."

Locator: J. G. Peterson.

"Located" July 9, 1900.

Filed and recorded: July 23, 1900.

Claim: 100 miners inches of water from Goose Creek,
which empties into Chichaco Creek about 3
miles from salt water of Lynn Canal about
22 miles from Juneau City, Northwest.

[In margins:] "Omitted." "Outside Dist."

Locators: J. P. Corbus.

Date: July 28, 1900.

Filed and recorded: July 28, 1900.

Claim: 500 miners inches of water of "this stream."

Place of intended use: Treadwell Mine.

Locator: Jualin Mining Co., by H. E. Hoggatt, Supt.

"Located" Aug. 11, 1900.

Filed and recorded: Sept. 7, 1900.

Claim: Additional 1500 miners inches of water from
Johnson's Creek.

Place of intended use: Locator's Mill or beyond.

[In margins:] "Omitted." "Outside Dist."

Locators: John G. Heid, O. L. Sandstone.

"Located" Aug. 18, 1900.

Filed and recorded: Sept. 19, 1900.

Claim: 1000 miners inches of water of creek empty-
ing into Taku Harbor on the North West
end thereof.

Place of intended use: Stand By No. 1 and Stand
By No. 2 Lode Claims.

Locators: O. L. Sandstone, John G. Heid and Henrietta C. Heid.

“Located” Sept. 4, 1900.

Filed and recorded: Sept. 19, 1900.

Claim: 2000 miners inches of waters of creek emptying into Takow Harbor immediately at the North end or head of said Harbor.

Place of intended use: Stand By No. 1 and Stand By No. 2 Lode Claims.

Locators: John Wagner, and H. H. Folsom.

Date: Sept. 15, 1900.

Filed and recorded: Oct. 2, 1900.

Claim: 3000 miners inches of water of Salmon Creek.

[2238]

Place of intended use: Boston King Mines.

Locator: Oliver Farnum.

Date: Dec. 24, 1900.

Filed and recorded: Dec. 26, 1900.

Claim: 250 inches of waters of creek or stream immediately opposite Douglas City, Alaska, southeast of “Belle View Gardens.”

Place of intended use: Town of Juneau.

Locator: Oliver Farnum.

Dated: Dec. 24, 1900.

Filed and recorded: Dec. 26, 1900.

Claim: 300 inches of water of creek or stream on
main land immediately opposite Douglas
City, Alaska, southeast of "Belle View
Gardens."

Place of intended use: Town of Juneau.

Locator: R. F. Lewis.

Date: Dec. 28, 1900.

Filed and recorded: Jan. 1, 1901.

Claim: 100 inches of Gold Creek.

Place of intended use: Town of Juneau.

Locator: Oliver Farnum.

Dec. 27, 1900.

Filed and recorded: Jan. 14, 1901.

Claim: 300 miners inches of water of the stream in
the ravine situated about one half of one
mile south east of and from the garden on
the main land immediately opposite Tread-
well's Wharf, sometimes called the Belle
View Ranch.

Locator: J. MacDonald, per Robt. A. Aineie.

Dated: March 17, 1901.

Filed and recorded: March 20, 1901.

Claim: 6000 inches of water or Sumer Creek, which empties into Sumer Lake, near Taku Inlet.

Place of intended use: Tide Water, Taku Inlet.

[In margins:] "Omitted." "Outside Dist."

[2239]

Locator: Joseph McDonald, per C. A. Weck.

Date: March 23, 1901.

Filed and recorded: April 1, 1901.

Claim: 1200 inches of water of Glacier Creek, Silver Bow Basin.

Locator: Joseph McDonald, per C. A. Weck.

Date: March 23, 1901.

Filed and recorded: April 1, 1901.

Claim: 500 inches of water of Snow Slide Gulch Creek, Silver Bow Basin.

Locator: J. C. Peterson.

Date omitted.

Filed and recorded: April 9, 1901.

Claim: 100 miners inches of water in Prairie Basin, running over Hidden Treasury, the You & I, the Blank and the Prairie Quartz Claims.

[In margins:] "Omitted." "Outside Dist."

Locator: John A. Williams.

Date: April 19, 1901.

Filed and recorded: April 20, 1901.

Claim: 300 inches of "this stream situate about one half mile in a Northerly direction from the Muir Lode Claim, Lemesurire Island."

Place of intended use: Muir Mill Site.

[In margins:] "Omitted." "Outside Dist."

Locator: J. C. Peterson.

Dated: April 24, 1901.

Filed and recorded: April 24, 1901.

Claim: 500 miners inches of Chechaco Creek (Prairie Basin), outlet of Reservoir Lake which is about 2 miles North of T Harbor on Linn Canal.

[In margins:] "Omitted." "Outside Dist."

[2240]

Locator: J. G. Peterson.

Date: April 24, 1901.

Filed and recorded: April 24, 1901.

Claim: 100 miners inches of water of Auk Mountain Creek in Prairie Basin.

[In margins:] "Omitted." "Outside Dist."

Page 119

Locator: L. C. Bach.

"Located" May 12, 1901.

Filed and recorded: May 13, 1901.

Claim: 200 inches of water of Gross Bay Gulch.

Place of intended use: Grass Bay Mine, situated
on the North of Sheep
Creek wharf.

Page 123

Locator: F. W. Bradley, per Charles Tappan.

Date: May 16, 1901.

Filed and recorded: June 10, 1901.

Claim. 60,000 inches of water from Turner Creek at
the mouth of Turner Lake.

Place of intended use: tide water, Taku Inlet.

[In margin:] "Omitted."

Page 128

Amended location.

Locators: John W. Price, Thos. C. Price, Charles D.
Price and Arthur D. Back.

Date: July 8, 1901.

Filed and recorded: July 10, 1901.

Claim: 2000 miners inches of water from Salmon
Creek.

Place of intended use: A point on Gastineau Chan-
nel about one half mile
South of the confluence of
Salmon Creek.

Locator: The South Eastern Alaska Mining & Milling Co.

“Located” June 12, 1901.

Filed and recorded July 13, 1901.

Claim: 10 cubic inches per second of time of water of Quartz Creek, which is a right hand tributary of McKinnis Creek.

Place of intended use: Locator’s mill site.

[In margin:] “Omitted.”

[2241]

Locators: H. H. Folsom, John Wagner, A. Goldstein and Chas. Goldstein.

“Located” July 13, 1901.

Filed and recorded: July 17, 1901.

Claim: 3000 miners inches of water from Ocean Wave Creek.

Place of intended use: Ocean Wave Group of Mines.

[In margins:] “Omitted.” “Outside Dist.”

Locator: Chas. H. Buschmann.

Date: July 12, 1901.

Filed and recorded: July 22, 1901.

Claim: “Water in this stream,” Litkoh Bay, Alaska.

[In margins:] “Omitted.” “Outside Dist.”

Locator: W. J. Hills.

"Located" Aug. 12, 1901.

Filed and recorded: Aug. 13, 1901.

Claim: "All of the water in this—Sheep Creek—
subject, however to lawful, valid and vested
rights, if any."

Place of intended use: Point near the shores of Gas-
tineaux Channel and op-
posite from the Ready
Bullion Mine on said
Channel.

Locator: Gust. Heidbergh.

Date: Aug. 6, 1901.

Filed and recorded: Aug. 13, 1901.

Claim: "The water from this shaft or prospect hole,
situated back of Lot 2 in Block "k" in Ju-
neau, Alaska."

Place of intended use: Locator's residence on said
lot.

Locator: N. V. Rowe.

"Located" July 30, 1901.

Filed and recorded: Aug. 13, 1901.

Claim: "Water right for the Doctor Quartz Claim.
[In margin:] "Omitted." [2242]

Locator: F. W. Bradley, per C. A. Weck, agent.

Date: Aug. 16, 1901.

Filed and recorded: Aug. 22, 1901.

Claim: 500 inches of water of Snow Slide Creek, Silver Bow Basin.

Locators: A. F. Judson, C. D. Mallory, attys. in fact
for the Macon Mining Association of
Alaska.

Date: Aug. 29, 1901.

"Located on the ground" Aug. 19, 1901.

Filed and recorded: Sept. 5, 1901.

Claim: 4000 inches of water from Spruce Creek.

Place of intended use: Beach Placer Claim.

[In margins:] "Omitted." "Outside Dist."

Locators: A. F. Judson and C. D. Mallory.

Date: Aug. 31, 1901.

Filed and recorded: Sept. 5, 1901.

Claim: 2000 inches of water from Silver Creek.

Place of intended use: Golden Queen Placer Claim.

[In margins:] "Omitted." "Outside Dist."

Locators: The Windham Bay Mining Coy.

Date: Aug. 29, 1901.

Filed and recorded: Sept 5, 1901.

Claim: 4000 inches of water from Spruce "Cream."

Place of intended use: "Florence J" placer claim.

[In margins:] "Omitted." "Outside Dist."

Locator: J. D. Sheldon.

Date: Aug. 26, 1901.

Filed and recorded: Sept. 10, 1901.

Claim: 2000 inches of water from East tributary of
Loch Mary.

Place of intended use: Ell Oro Lode Claim.

[In margins:] "Omitted." "Outside Dist."

[2243]

Locator: J. D. Sheldon.

Date: Aug. 26, 1901.

Filed and recorded: Sept. 10, 1901.

Claim: 4000 inches of water from the foot of Loch
Mary.

Place of intended use: Manufacturing and Milling
Site at the mouth of Louis
River at its juncture with
the salt water, which river
is a tributary of Wynd-
ham Bay.

[In margins:] "Omitted." "Outside Dist."

Locators: John Prior, John Olds and Thos. Smith.

"Located" Sept. 12, 1901.

Filed and recorded: Sept. 23, 1901.

Claim: 2000 inches of water of Boulder Creek, which
empties into Berners Bay on the Southeast
side.

[In margins:] "Omitted." "Outside Dist."

Locator: P. R. Nelson.

Date: Sept. 25, 1901.

Filed and recorded: Sept. 28, 1901.

Claim: All the water of Nelson Creek, which empties
into Gastineaux Channel between Pt.
Bishop & Indian Village.

Place of intended use: Pt. Bishop Mine.

Locator: W. J. Hills.

"Located" Oct. 3, 1901.

Filed and recorded: Oct. 5, 1901.

Claim: All the water of Sheep Creek which is not
now legally and lawfully appropriated.

Place of intended use: Near Nowell wharf on beach
of Gastineaux Channel.

Locator: Alaska Atlin Mining Company, by John
Wagner, Superintendent.

Date: Oct. 7, 1901.

Filed and recorded: Oct. 11, 1901.

Claim: All the water of Ready Bullion Creek lying,
being and flowing over the Venice Lode
Claim, Douglas Island.

Place of intended use: "Alaska Alin Mine." [2244]

Page 181

Locator: John Wagner.

Date: Oct. 14, 1901.

Filed and recorded: Oct. 21, 1901.

Claim: All of the water in Wa-co-Chief Creek,
South side of Douglas Island, flowing into
Stephens Passage.

Place of intended use: Power plant at a point on the
beach near the mouth of
said creek.

Page 211

Locator: Falis Merckx.

Date omitted.

Filed and recorded: Feb. 19, 1902.

Claim: 5 miners inches of water, "1500 feet from
beach coming down the mountain passing
50 feet East from Armorary Hall, 150 feet
West from story and half house belonging
to myself."

Page 217

Locators: M. Brown and Geo. C. Stanley.

Date: Mar. 1, 1902.

Filed and recorded: Mar. 13, 1902.

Claim: "All water rights and tributaries of this
creek situated one hundred yards East of
Auk Village."

[In margin:] "Omitted."

Locator: Wilfrid R. Morgan.

"Located" Mar. 19, 1902.

Filed and recorded: Mar. 22, 1902.

Claim: All the water flowing in Turner Creek, which
flows into Taku Inlet about three miles
Southeast of Jaw Point.

[In margin:] "Omitted."

Locators: N. A. Neidham and Colone Winn.

Date: Mar. 22, 1902.

Filed and recorded: Mar. 22, 1902.

Claim: Full extent of all water running in "Lake
& Stream."

Place of intended use: Mill Site Quartz Claim on the
beach running North East
to Auk Lake. [2245]

Locators: P. McMullen, M. Campbell, James Mc-
Closkey, B. Burg and John McLaugh-
lin.

"Located" Feb. 14, 1898.

Filed and recorded: Mar. 3, 1898.

Claim: 5000 miners inches of water of Glacier Creek,
which heads about two miles South of
Pyramid Harbor.

[In margins:] "Omitted." "Outside Dist."

Locator: W. H. Hile.

Posted: Mar. 22, 1899.

Filed and recorded: Mar. 22, 1898.

Claim: 10,000 miners inches of water from Snow
Slide Gulch.

Place of intended use: "Last Chance."

Locator: W. H. Hile.

Posted: Mar. 17, 1898.

Filed and recorded: Mar. 22, 1898.

Claim: 10,000 inches of water of Gold Creek.

Place of intended use: Last Chance Placer Claim.

Locator: Mullen Mining and Manufacturing Coy., by
H. W. Mellen and H. E. Hoggott, man-
agers.

Date omitted.

Filed and recorded: Mar. 28, 1898.

Claim: 500 inches of water from stream which flows
out of Snow Slide Gulch into Sherman
Creek near Seward City.

Place of intended use: Locator's Mill Site.

[In margins:] "Omitted." "Outside Dist."

Locator: Mellen Mining and Manufacturing Co., by
H. W. Mellen and H. E. Hoggott, Man-
agers.

"Located" Mar. 23, 1898.

Filed and recorded: Mar. 28, 1898.

Claim: "All the water flowing in this creek."

Place of intended use: Mill Site about 600 feet South
West from location notice.

[In margins:] "Omitted." "Outside Dist."
[2246]

Locator: Mellen Mining and Manufacturing Co., by
H. W. Mellen and H. E. Hoggott, Man-
agers.

"Located" Mar. 18, 1898.

Filed and recorded: Mar. 28, 1898.

Claim: 500 inches of water of creek flowing out of
the Impregnable Gulch and emptying into
Sherman Creek near Seward City.

Place of intended use: Mill site about 2000 feet down
creek from location notice.

[In margins:] "Omitted." "Outside Dist."

Locator: Charles S. Barns, Agent for The Colorado Mining and Milling Company.

Posted: Feb. 14, 1898.

Filed and recorded: April 6, 1898.

Claim: 2000 inches of water of Glacier Creek, which empties into Chilkat Inlet of Lynn Canal.

Place of intended use: Colorado Placer Claim.

[In margins:] "Omitted." "Outside Dist."

Locators: Mike Creman, A. H. Wall, Henry Creman, John Barling, Steward Wall, Jacob Meyer, George Bauer and Chas. Parker.

Date: May 3, 1898.

Filed and recorded: May 5, 1898.

Claim: 5000 miners inches of water of Grind Stone Creek.

Place of intended use: Cherokee Placer Mine.

[2247]

Water locations contained in Volume 6 of Placer, Water and Mill Sites.

Locator: Jualin Mining Co. by Frank B. Sulley, agt. and atty. in fact.

Date: April 20, 1898.

Filed and recorded: May 11, 1898.

Claim: 500 inches of water from Johnson Creek, Berners Bay Mining District.

Place of intended use: Jualin Flume.

[In margins:] "Omitted." "Outside Dist."

Locator: Jualin Mining Co., by Frank P. Sulley,
agt. and attorney in fact.

Date: April 20, 1898.

Filed and recorded: May 11, 1898.

Claim: 600 inches of water from Johnson Creek,
Berners Bay Mining District.

Place of intended use: Jualin Mill Site.

[In margins:] "Omitted." "Outside Dist."

Locator: Jualin Mining Co., by Frank P. Sulley,
agt. and attorney in fact.

Date: April 20, ———

Filed and recorded: May 11, 1898.

Claim: 600 inches of water of Johnson Creek, Ber-
ners Bay Mining District.

Place of intended use: Undine Mill Site.

[In margins:] "Omitted." "Outside Dist."

Locator: John N. Tisdale.

Date omitted.

Filed and recorded: July 5, 1898.

Claim: 10,000 inches of water from "side hill below
the Lis Bubble and Daisy Bell Quartz
Claims.

[In margins:] "Omitted." "Outside Dist."

Page 31

Locators: Joseph McComb and H. I. Cleaver.

Date: July 30, 1898.

Filed and recorded: July 30, 1898.

Claim: 1000 inches of waters of Nevada Creek,
Douglas Island.

Place of intended use: Venice and Florence Claims.

Page 32

Locators: Joseph McComb and H. I. Cleaver.

Date: July 30, 1898.

Filed and recorded: July 30, 1898.

Claim: 500 inches of water from the "waters of a
creek or stream on said Douglas Island,
which stream is about one mile West of
Nevada Creek."

Place of intended use: Venice and Florence Mining
Claims.

Page 40

Locators: J. H. Stephens, and G. W. Rudd.

"Located" Aug. 3, 1898.

Filed and recorded: Aug. 22, 1898.

Claim: 5000 inches of water from certain stream of
water emptying into Lynn Canal at a point
South of and near the mouth of Eagle
River, Alaska.

Place of intended use: "Some point down the stream
suitable for a mill site."

[In margins:] "Omitted." "Outside Dist."

Locators: John Keinian and John McCrorie.

"Located" Aug. 7, 1898.

Filed and recorded: Sept. 9, 1898.

Claim: 1600 inches of water of Johnson Creek, Berners Bay Mining District.

Place of intended use: 20 acres of ground at the head of Johnson Creek.

[In margins:] "Omitted." "Outside Dist."

Locator: Henry States.

Date: Oct. 21, 1898.

Filed and recorded: Oct. 29, 1898.

Claim: 1500 miners inches "in this stream."

Place of intended use: Blue Gravel Mine at the falls of West Bend, of McGinniss Creek, Mining Dist.

[In margin:] "Omitted."

[2249]

Locator: Henry States.

Date: Oct. 21, 1898.

Filed and recorded: Oct. 29, 1898.

Claim: 1000 miners inches of "this stream."

Place of intended use: Blue Gravel Mining Claim at the head of the left hand East Branch fork of McGinness Creek, Harris Mining District.

[In margin:] "Omitted."

Page 96

Locator: Alaska Gold Mine Co. of Ind., by Hasley
R. Snyder, agent for said Company.

"Located" Nov. 3, 1898.

Filed and recorded: Nov. 19, 1898.

Claim: 1000 miners inches of Johnson Creek, Ber-
ners Bay Mining District.

Place of intended use: Alaska Gold Min. Co. of Ind.
Quartz Mill.

[In margins:] "Omitted." "Outside Dist."

Page 97

Locators: J. P. Corbus, J. A. Williams and Wm.
Stubbins.

"Located" Nov. 19, 1898.

Filed and recorded: Nov. 21, 1898.

Claim: 600 inches of water "in this creek," which is
on the North side of Douglas Island and
known as Kowee Creek.

Place of intended use: Town of Douglas, for water
supply purposes.

Page 98

Locators: J. P. Corbus, J. A. Williams and Wm.
Stubbins.

"Located" Nov. 18, 1898.

Filed and recorded: Nov. 21, 1898.

Claim: 600 inches of Lawson or Big Creek, North
side of Douglas Island.

Place of intended use: Town of Douglas for water
supply purposes. [2250]

Locators: J. W. Price, Thomas C. Price and Charles
D. Price.

Date: Sept. 23, 1898.

Filed and recorded: Nov. 25, 1898.

Claim: 1000 miners inches of water of Salmon Creek.

Place of intended use: Juneau, for domestic pur-
poses.

Locator: James Cannon.

Date: July 25, 1898.

Filed and recorded: Dec. 6, 1898.

Claim: 800 inches of water of Cannon Creek, "situ-
ated in Alaska Mining District."

[In margin:] "Omitted."

Locators: R. S. Campbell and Peter Mohr.

Date: Nov. 24, 1898.

Filed and recorded: Jan. 6, 1899.

Claim: 2000 miners inches of water of Glacier Creek,
which empties into Klehena River.

Place of intended use: "Above on Klehena River."

[In margins:] "Omitted." "Outside Dist."

Locators: John Jonnston, Oscar Foote and Michael
Hearty.

Date omitted.

Filed and recorded: Jan. 12, 1899.

Posted: Jan. 2, 1899.

Claim: 8000 miners inches of waters of Salmon
Creek.

Locators: C. S. Price, E. V. Cabbage and Wm. P.
Ballance.

“Located” Jan. 2, 1899.

Filed and recorded: Jan. 12, 1899.

Claim: 7500 cubic inches per second of time from
waters of Salmon Creek. [2251]

Locators: C. S. Price, E. V. Cabbage and Wm. P.
Ballance.

“Located” Jan. 2, 1899.

Filed and recorded: Jan. 12, 1899.

Claim: 5000 cubic inches per second of time from
Effie Creek near Taku River.

Locator: D. Murphy.

Date: Jan. 26, 1899.

Filed and recorded: Feb. 3, 1899.

2512 *Alaska-Juneau Gold Mining Company vs.*

Claim: 2000 miners inches of water of Glacier Creek
at mouth of Murphy's Glacier, left hand
branch of creek.

[In margins:] "Omitted." "Outside Dist."

Page 286

Locator: Peter Mohn.

Date: Jan. 26, 1899.

Filed and recorded: Feb. 3, 1899.

Claim: 2000 miners inches of "this stream."

Place of intended use: Pyramid Harbor Mng. Co.
claim situated at mouth
of the creek named Dis-
covery Creek in the Ju-
neau Mng. Dist. of
Alaska.

[In margins:] "Omitted." "Outside Dist."

Page 286

Locator: J. P. Lindsay.

Date: Jan. 26, 1899.

Filed and recorded: Feb. 3, 1899.

Claim: 2000 miners inches of water of "this stream."

Place of intended use: Chilkat Mng. Co.

[In margins:] "Omitted." "Outside Dist."

[2252]

Water Locations contained in Volume 7 of Placers.

Page 61

Locators: R. H. Wynn and D. C. Stepens.

Date: Mar. 7, 1899.

Filed and recorded: Mar. 15, 1899.

Claim: 6000 miners inches of water of stream called
Dutch Pete and its tributaries.

[In margins:] "Omitted." "Outside Dist."

Page 68

Locator: Last Chance Gold Mining Co., by I. N. Gordon, Supt.

Date: Mar. 18, 1899.

Filed and recorded: Mar. 20, 1899.

Claim: 500 miners inches of water from "a certain
mountain stream coming from the mountain North of Last Chance Basin and flowing into said Basin."

Place of intended use: Last Chance Basin.

[In margin:] "Omitted."

Page 69

Locator: Last Chance Gold Mining Company, per
I. N. Gordon, Supt.

Date: Mar. 18, 1899.

Filed and recorded: Mar. 20, 1899.

Claim: 500 miners inches of water of "Mountain
Stream emptying into Last Chance Basin."

Place of intended use: Last Chance Flume and Placer
Basin.

Locator: Samuel L. Lovell, by J. B. Phillips, atty. in fact.

Date: Mar. 30, 1899.

Filed and recorded: May 5, 1899.

Claim: 3000 inches of water of Nugget Creek.

Place of intended use: Niaggra, Townsend and Salem beach claims.

[In margin:] "Omitted."

Locators: O. H. Savage, Pat Hutton and E. M. Rusk.

Date: omitted.

Filed and recorded: May 24, 1899.

Claim: 20,000 miners inches of water of Wat Ka Chee Creek on Southwest side of Douglas Island.

[2253]

Locators: C. H. Harrison and J. N. Beam.

Date: May 20, 1899.

Filed and recorded: May 26, 1899.

Claim: 2000 cubic inches per second of time from Reservoir Lake, situated in Harris Mining District about $3\frac{1}{2}$ miles North Easterly from "Te" Harbor on Lynn Canal.

Place of intended use: Mill Site about two miles Northwesterly from point where notice is posted, down said stream.

[In margins:] "Omitted." "Outside Dist."

Locator: Wm. M. Ebner.

Page 287

Date: May 25, 1899.

Filed and recorded: June 1, 1899.

Posted: April 25, 1899.

Claim: All the water from Southwest Gulch, Southwest gulch No. 1, South Gulch and South Gulch No. 1, situated on the South and southwest slope of Juneau Mountain.

Place of intended use: Boston Group of Lode Claims.

Page 288

Locators: John Kernian and John McCrorie.

"Located" May 26, 1899.

Filed and recorded: June 2, 1899.

Claim: 1600 inches of water of Johnston Creek.

Place of intended use: Placer claim No. 2, situated on said creek and about one mile above the Jullian Mine in the Berner's Bay Mining District.

[In margin:] "Omitted." "Outside Dist."

Page 295

Locators: John A. Williams, Wm. Stubbins and J. P. Corbus.

"Location made and notice posted" June 21, 1899.

Filed and recorded: June 22, 1899.

Claim: 200 miners inches of water of the overflow from the Treadwell Ditch and waters from Springs and the natural flowing water coming in below the Treadwell Ditch between

2516 *Alaska-Juneau Gold Mining Company vs.*

Big Creek, sometimes called Lawson Creek, and the North end of the Treadwell Mine.

Place of intended use: Douglas City, for water supply. [2254]

Locator: A. H. Davis.

Page 297

Date: June 24, 1899.

Filed and recorded: June 28, 1899.

Claim: "Nominal cubic inches per second of time"
of "the water running in this stream."

Place of intended use: Locator's quartz lode.

[In margin:] "Omitted." "Outside Dist."

Page 320

Amended location.

Locators: John McCrorie and John Kiernan.

Date: Aug. 5, 1899.

Filed and recorded: Aug. 5, 1899.

Claim: 1600 inches of water of Johnson Creek in the
Bernier's Bay Mining District.

Place of intended use: 20 acres of ground at the
head of Johnson Creek.

[In margins:] "Omitted." "Outside Dist."

Locators: J. W. Van Winkle, Jr., W. M. Van Winkle, R. Van Winkle, M. Danforth, Lyda Danforth and D. A. Donelson.

“Located” Sept. 2, 1899.

Filed and recorded: Oct. 19, 1899.

Claim: 3000 miners inches of water of Ruby Creek, a tributary of the Tarkin River.

Place of intended use: No. 1 Van Winkle Claim, Pinker claim, Pedro claim, claims Nos. 24, 25, 26, 27, 28, 29 and 30, all situated on the Tarkin River.

[In margins:] “Omitted.” “Outside Dist.”

Re-location notice.

Locators: F. H. Hiller, et al.

Page 383

“Located” Oct. 30, 1899.

Filed and recorded: Nov. 4, 1899.

Claim: 2000 cubic inches per second of time of water of “this stream.”

Place of intended use: “From this point to tide water, 1500 feet more or less in a Northerly direction.”

[In margin:] “Omitted.” “Outside Dist.”

[2255]

Locators: Chas. Goldstein, John Wagner and H. H. Folsom.

Date: Sept. 16, 1904.

Filed and recorded: Nov. 18, 1904.

Claim: All the water of creek to be known as West Fork, heading on the Northwesterly side of the Summit of Mt. Juneau, directly below what is known as the Flag Pole.

Place of intended use: Croesus and Croesus Parallel Mining Claim.

Locators: Chas. Goldstein, H. H. Folsom, and John Wagner.

Date: Sept. 16, 1904.

Filed and recorded: Nov. 18, 1904.

Claim: All the water of creek to be known as the North Fork, heading out on the Northwesterly side of the Summit of Mt. Juneau directly below what is known as the Granit Point on Mt. Juneau.

Place of intended use: Croesus and Croesus Parallel Mining Claims.

Locator: Don S. Rae.

Date: Jan. 30, 1905.

Filed and recorded: Mar. 15, 1905.

Claim: 3000 miners inches of water of Lost Rocker Falls, near Sheep Creek.

Locator: R. F. Lewis, by his atty. in fact, Harry
Bishop.

Date: Feb. 28, 1905.

Filed and recorded: Mar. 17, 1905.

Claim: 5000 inches of water of Salmon Creek.

Place of intended use: City of Juneau. [2256]

Locator: Ben Bullard.

Page 292

Date: April 8, 1905.

Filed and recorded: April 11, 1905.

Claim: 20,000 inches of water of Glacier River.

Place of intended use: Left bank of said stream
about one half mile below
where said stream comes
from under Mendenhall
Glacier. [2257]

Water locations contained in Volume 10 of
Placer and Water Locations.

Locators: T. H. Ellis and V. Prest.

Page 1

Date: May 3, 1905.

Filed and recorded: May 10, 1905.

Claim: 1000 inches of water of Montana Creek.

Place of intended use: Windfall Creek claims.

[In margins:] "Omitted." "Outside Dist."

Locator: Kate Kabler.

Page 2

Date: April 30, 1905.

Filed and recorded: May 10, 1905.

Claim: 1000 inches of water of Spruce Creek.

Place of intended use: "Venus *Quart* Claim."

[In margins:] "Omitted." "Outside Dist."

Locator: R. P. Nelson.

Page 4

"Located" June 7, 1905.

Filed and recorded: June 8, 1905.

Claim: 5 cubic feet of water per second of time from
a "small stream about one quarter mile
Northeast of the town *sight* of Juneau."

Place of intended use: City of Juneau.

Locator: T. C. Hallum.

Page 14

Date: July 19, 1905.

Filed and recorded: Aug. 4, 1905.

Claim: 3000 miners inches of water of Salmon
Creek.

Place of intended use: Horse Shoe Group of Mining
Claims.

Locator: V. McFarland.

Page 18

Date: July 24, 1905.

Filed and recorded: Aug. 26, 1905.

Claim: 1000 miners inches of water of Lurvy Creek,
Silver Bow Basin.

Place of intended use: B. S. Fraction Placer.

Locator: John R. Mitchell, Agent for the Perseverance Mining Co.

Date: Sept. 1, 1905.

Posted: Aug. 24, 1905.

Surveyed: Aug. 29, 1905.

Filed and recorded: Sept. 28, 1905.

Claim: 800 miners inches of water from South Branch of Gold Creek.

Place of intended use: Alta Mill Site.

Locator: John R. Mitchell, agent for the Perseverance Mining Co.

Date: Sept. 1, 1905.

Posted: Aug. 24, 1905.

Surveyed: Aug. 29, 1905.

Filed and recorded: Sept. 28, 1905.

Claim: 2000 miners inches of water of Gold Creek.

Place of intended use: Alta Mill Site.

Locator: Fred Hannila.

Date: Oct. 1, 1905.

Filed and recorded: Oct. 3, 1905.

Claim: 2000 miners inches of water of Sherman Creek, Berners Bay District.

[In margin:] "Omitted." "Outside Dist."

2522 *Alaska-Juneau Gold Mining Company vs.*

Locator: John R. Winn.

Page 32

"Located" Sept. 22, 1905.

Filed and recorded: Oct. 10, 1905.

Claim: Fish trap on Pleasant Island, which extends
into the waters of Icy Straits.

[In margins:] "Omitted." "Outside Dist."

[2259]

Page 35

Locators: Harry Bishop and James Joyce.

"Located" Aug. 26, 1905.

Filed and recorded: Oct. 23, 1905.

Claim: All of the water of Alder Creek and the
water shed tributary to the same, which
creem empties into Taku Inlet on the North
side thereof.

Page 36

Locators: John G. Heid, P. S. Early and Frank
Bach.

Date: Aug. 1, 1905.

Posted: Aug. 1, 1905.

Filed and recorded: Oct. 27, 1905.

Claim: 5000 inches of water from Southeast fork of
Row-eeh Creek.

Place of intended use: Mill site and power site of
Dividend group of lode
mining claims.

[In margin:] "Omitted."

Page 39

Locator: Alaska Perseverance Mining Co., by John
R. Mitchell, Agent.

Date: Nov. 17, 1905.

Posted: Nov. 17, 1905.

Filed and recorded: Nov. 20, 1905.

Claim: 1000 miners inches of water of "this creek."

Place of intended use: Una Mill Site.

Locator: W. O. Crosby.

Page 48

Oct. 29, 1905.

Posted: Oct. 29, 1905.

Filed and recorded: Dec. 20, 1905.

Claim: 5000 inches of water from Salmon Creek.

Place of intended use: Price placer claims. [2260]

Locator: Arthur H. Smith.

Page 57

Date: Dec. 29, 1905.

Filed and recorded: Jan. 2, 1906.

Claim: 30,000 miners inches of water of Lemon
Creek.

Place of intended use: Lemon Creek mining prop-
erty.

Locator: F. C. Hammond.

Page 59

"Dated and posted" Jan. 3, 1906.

Filed and recorded: Jan. 4, 1906.

Claim: 15,000 miners inches of water from Sheep
Creek.

Place of intended use: Power plant on beach of Gas-
tineaux Channel.

2524 *Alaska-Juneau Gold Mining Company vs.*

Locator: M. J. O'Connor. Page 63

"Location made and notice posted" Feb. 13, 1906.

Filed and recorded: Feb. 14, 1906.

Claim: 250 miners inches of water of the overflow
from the Treadwell ditch between Lawson
Creek and the North end of the Treadwell
Mine.

Place of intended use: Douglas City.

Locator: Peter Carlson. Page 65

Date: Mar. 1, 1906.

Filed and recorded: Mar. 9, 1906.

Claim: 2000 miners inches per second of time of
waters of Sherman Creek, Berners Bay
District.

[In margins:] "Omitted." "Outside Dist."

Page 81

Locator: Jualin Mines Company, by Herbert E.
Hoggatt, agent and attorney in fact

Date: May 26, 1906.

Filed and recorded: June 13, 1906.

Claim: 1000 inches of water of Johnson Creek, Ber-
ners Bay Mining District.

Place of intended use: Locator's mill site.

[In margins:] "Omitted." "Outside Dist."

[2261]

Locator: Don S. Rae. Page 84

Date: July 24, 1906.

Filed and recorded: July 25, 1906.

Claim: 3000 inches of water of Gold Creek.

Place of intended use: Mary B. quartz claim mill
site &. power site.

Locator: August Olson. Page 85

Date: Aug. 8, 1906.

Posted: Aug. 8, 1906.

Filed and recorded: Aug. 8, 1906.

Claim: Water of certain natural river rising in the
foot hills lying South West of platted por-
tion of the town of Douglas.

Place of intended use: certain dwelling houses in
Douglas.

Locator: L. P. Johnson. Page 88

Date: Sept. 7, 1906.

Filed and recorded: Oct. 3, 1906.

Claim: 20,000 miners inches of waters of Bullion
Creek, Douglas Island.

Page 88

Locators: Abner Murray and John Henson.

Date: Oct. 6, 1906.

Posted: Oct. 6, 1906.

Filed and recorded: Oct. 8, 1906.

Claim: 2000 miners inches of water of Fish Creek.

Place of intended use: Point on beach of Gastineaux
Channel. [2262]

Locator: Waldo States

"Located" Jan. 8, 1907.

Filed and recorded: Jan. 29, 1907.

Claim: 10,000 inches of water of Glacier River.

Place of intended use: "power plant."

Locator: M. F. Howe.

Date: April 22, 1907.

Filed and recorded: April 22, 1907.

Claim: 5000 miners inches of waters of Salmon Creek.

Place of intended use: Beach.

Locator: Ben Bullard.

Date: April 24, 1907.

Filed and recorded: May 14, 1907.

Claim: 1000 miners inches of water of Steep Creek,
which flows out of the divide between Lem-
mon Creek and Glacier River.

Place of intended use: Point on the flats just below
Mendenhall Glacier.

Locator: Elias Ruud and C. M. Thorndyke.

Date: May 18, 1907.

Filed and recorded: May 27, 1907.

Claim: 1500 miners inches of water of Granite Creek.

Place of intended use: About one hundred feet above
the Nowell dam in said
Granite Creek.

Locator: Peter Reilly.

Date: June 22, 1907.

Filed and recorded: July 8, 1907.

Claim: ten cubic feet of water per second of time of
Granite Creek, Silver Bow Basin. [2263]

Locators: Elias Ruud and Jesse Blakeley.

Date: July 16, 1907.

Filed and recorded: July 24, 1907.

Claim: 1500-miners inches of waters of Granite Creek.

Place of intended use: Silver Bow Basin, Juneau,
Douglas and vicinity.

Locator: I. N. Stephenson.

Date: July 18, 1907.

Filed and recorded: July 25, 1907.

Claim: 4000 miners inches of water of Boulder Creek.

Place of intended use: Group of mining claims con-
sisting of Washington
Bluff, Sumdu, Gold Bug,
Dandy, McKinney and
Cale.

[In margins:] "Omitted." "Outside Dist."

Locators: Gudmund Jensen, Richard Johnson, James
Joyce and J. J. McGrath.

“Located” May 29, 1907.

Filed and recorded: Aug. 1, 1907.

Claim: 2000 miners inches of water from right second
hand fork of Cowee Creek, about 5 miles
from Echo Harbor.

Place of intended use: Group of lode claims known
as Maud Mina, Blue Jay
and others.

[In margin:] “Omitted.”

Locator: Alaska Reliance Gold Mining Company.

Date: July 22, 1907.

Filed and recorded: Aug. 1, 1907.

Claim: 2500 miners inches of waters of Sheep Creek.

Place of intended use: Sheep creek opposite Nowell
Gold Mine.

Locator: L. P. Shackelford.

Date: Nov. 1, 1907.

Filed and recorded: Nov. 6, 1907.

Claim: 7000 miners inches of water of Sheep Creek.

Place of intended use: Head of pipe line below on
said creek which connects
with compressor plant at
beach. [2264]

Locator: L. B. Johnson.

Date: Nov. 5, 1907.

Filed and recorded: Nov. 7, 1907.

Claim: 20,000 inches of water from reservoir at foot
of Mt. Jumbo embracing head water of
Bullion Creek.

Place of intended use: Mexican Mine.

Locator: Stewart Wood.

Date Jan. 8, 1908.

Filed and recorded: Jan. 30, 1908.

Claim: 1000 miners inches of water of Glacier Creek,
Berners Bay District, Harris Mining Dis-
trict.

Place of intended use: Placer Claim No. 1.

[In margin:] "Omitted."

Locator: Lewis Lund.

Date: Jan. 6, 1908.

Filed and recorded: Feb. 15, 1908.

Claim: All the water of certain stream situated on
the mountain side $\frac{1}{2}$ mile North of Lewis
Lund homestead.

Locator: Pisetta Noe and Wm. N. C. Waddleton.

Date: July 7, 1908.

Filed and recorded: Aug. 8, 1908.

Claim: Full capacity of flume at the intersection of locators' intake with natural course of stream, from waters of third "Snowslide" stream from the mountains from Juneau to Sheep Creek.

Place of intended use: Beach of Gastineaux Channel.

Locators: J. H. Stephens and Tom Dull.

Date: July 8, 1908.

Filed and recorded: Aug. 8, 1908.

Claims: 5000 inches of water from creek which empties into Montana Creek.

Place of intended use; Auk Bay. [2265]

[In margin:] "Omitted."

Locator: T. H. Ellis.

Date: Mar. 26, 1902.

Filed And Recorded: April 1, 1902.

Claim: 500 miners inches of water of the stream that flows in the gulch upon which the quartz claims known as the Gray Eagle, Doctor, Evening Star and Ophir are located.

Place of intended use: Ophir Mill Site.

[In margins:] "Omitted." "Outside Dist."

Locators: Wm. Winn, O. F. Des Rocher, and H. C. Sanford.

Date: April 5, 1902.

Filed and recorded: April 8, 1902.

Claim: "Ground for a *canery* site, including all water rights, appertaining to said ground" at the head of Douglas Island and near what is known as Fritzes Cove.

[In margins:] "Omitted." "Outside Dist."

Locator: Falis Marcx.

Date: April 18, 1902.

Filed and recorded: April 18, 1902.

Claim: 10 inches of water from "this stream."

Place of intended use: "About 1000 feet up the hill from the Bears Nest Stam-Mill."

Locator: Detroit Mining Co., per Henry States, agent.

Date: April 28, 1902.

Filed and recorded: May 3, 1902.

Claim: 3000 miners inches of water of Windfall Creek.

Place of intended use: Locator's placer claims.

[In margins:] "Omitted." "Outside Dist."

Locators: John Wagner, V. McFarland and L. B. Wickersham.

"Located" May 1, 1902.

Filed and recorded: May 6, 1902.

Claim: 3000 miners inches of water from St. James Creek.

[In margins:] "Omitted." "Outside Dist."
[2266]

Locators: Wm. Winn and N. A. Needham.

"Located" July 3, 1902.

Filed and recorded: July 3, 1902.

Claim: Auk Lake and also the stream furnishing the outlet of said lake.

Purpose: "Fish Hatcher."

Locators: N. A. Needham and Wm. Winn.

Date: Sept. 5, 1902.

Filed and recorded: Sept. 10, 1902.

Claim: Stream which flows into Auk Lake on the North East side thereof.

Purpose: In connection with locators' salmon fish hatchery.

Locators: Harvey I. Larrison and Christian Dorr.

Date: Sept. 16, 1902.

Filed and recorded: Sept. 20, 1902.

Claim: Tent Creek and Tusta Creek, both emptying into Salt Lake, which lake is situated about thirty miles West of Juneau and empties into Lynn Canal at Kish-brook Island.

Purpose: Fish Hatchery.

[In margins:] "Omitted." "Outside Dist."

Locator: John Wagner.

Page 262

Date: July 1, 1902.

Filed and recorded: Sept. 30, 1902.

Claim: All the water running in Salmon Creek at 2nd falls about 3 miles Northwest of Juneau.

Place of intended use: Alaska King Mining Company's mining property.

[2267]

Locator: R. F. Lewis, by his attorney in fact, C. M. Summers.

Date: Feb. 6, 1903.

Filed and recorded: Feb. 6, 1903.

Claim: 200 inches of water flowing in Gold Creek and from springs adjacent thereto.

Place of intended use: North end of Franklin St., Juneau. [2268]

WATER LOCATIONS CONTAINED IN VOLUME 9 OF PLACER AND WATER LOCATIONS.

Page 1

Locator: W. H. Hile.

Date omitted.

Filed and recorded: Mar. 19, 1903.

Claim: 10,000 miners inches of water running in Gold Creek.

Page 5

Locators: J. B. Barnes, J. A. Black, J. T. Martin and Milo Kelly.

"Located" April 5, 1903.

Filed and recorded: April 14, 1903.

Claim: all surplus water of Saw Mill Creek, Berners Bay.

Place of intended use: Captain & Mate Lode Claim.
[In margins:] "Omitted." "Outside Dist."

Page 6

Locator: W. H. Hile.

Date: April 20, 1903.

Filed and recorded: April 21, 1903.

Claim: 10,000 miners inches of Gold Creek.

Place of intended use: Placer claim known as the "Last Chance."

Locators: Ralph B. Day and John Olds.

"Located" Jan. 10, 1903.

Filed and recorded: May, 1, 1903.

Claim: 6000 inches of water of Glacier River.

Place of intended use: Power plant on Glacier
River.

Locator: C. D. Mallory.

Date: June 26, 1903.

Filed and recorded: July 7, 1903.

Claim: 4000 miners inches of water per "second
minute" of time of Glacier Creek, the out-
let of Glacier Lake at the foot of Eagle
Glacier.

Place of intended use: Heid, Sanstone, Ward group
of quartz mining claims.

[In margin:] "Omitted." [2269]

Locator: C. D. Mallory.

Date: June 26, 1903.

Filed and recorded: July 7, 1903.

Claim: 2000 miners inches of water per "minute
second" of time of Ward Creek, which is
a tributary of Eagle River.

Place of intended use: Heid, Sandstone, Ward
group of quartz mining
claims.

[In margin:] "Omitted."

Locator: C. D. Mallory.

Date: June 26, 1903.

Filed and recorded: July 7, 1903.

Claim: 1000 miners inches of water per "second, minute" of time of Mallory Creek, which is a tributary of Eagle River.

Place of intended use: Sanstone, Heid, Ward group of quartz mining claims.

[In margin:] "Omitted."

Locator: C. D. Mallory.

Page 45

Date: June 26, 1903.

Filed and recorded: July 7, 1903.

Claim: 1500 miners inches per minute of time of the water of Sandstone Creek, a tributary of Eagle River.

Place of intended use: Heid, Sandstone, Ward group of quartz mining claims.

[In margin:] "Omitted."

Locator: C. D. Mallory.

Page 46

Date: June 26, 1903.

Filed and recorded: July 7, 1903.

Claim: 2000 miners inches of water per "second, minute" of time of certain creek flowing through Bear Creek canyon from underneath Eagle Glacier.

Place of intended use: Heid, Sandstone, Ward group of quartz mining claims.

Locator: C. D. Mallory.

Date: June 26, 1903.

Filed and recorded: July 7, 1903. [2270]

Claim: 4000 miners inches of water per "second, minute" of time of tributaries and outlet of Glacier Lake, situate at the base of Eagle Glacier and emptying into Eagle River.

Place of intended use: Heid, Sandstone, Ward
group of quartz mining
claims.

[In margin:] "Omitted."

Locators: J. A. Mays and P. Hansen.

Date omitted.

Filed and recorded: Aug. 13, 1903.

Claim: 10,000 inches of waters of Nugget Creek.

Locator: C. K. Shubert.

Date: Aug. 14, 1903.

Filed and recorded: Aug. 17, 1903.

Claim: 3000 miners inches of water of "said creek."

Place of intended use: Point North of Sheep Creek
in what is known as
Glacier Basin.

Locators: M. C. Shubert, Delia Rae, David Staup
and J. W. Caddus.

Date: Aug. 15, 1903.

Filed and recorded: Aug. 17, 1903.

Claim: Water on what is known as the Lost Rocker
Falls, Harris Mining District.

Locator: T. C. Hallum.

Date: Aug. 31, 1903.

Filed and recorded: Sept. 8, 1903.

Claim: "The water running in this Salmon Creek
(and Falls) stream to the extent of power
enough to mine and operate the Klondike
Group of Mining Claims."

Locators: A. L. Dewan, Thomas Schram, R. E.
Gross, P. J. Howard, A. McIntyre,
Helen A. Krouse, Thomas A. Smyth
and W. E. Fry.

"Located" Sept. 19, 1903.

Filed and recorded: Sept. 23, 1903. [2271]

Claim: 10,000 miners inches of water of Green
River.

[In margins:] "Omitted." "Outside Dist."

Locator: Chas. Stewart.

Date: Sept. 5, 1893.

Filed and recorded: Sept. 23, 1903.

Claim: 1000 inches of water from Dry Creek, on
Point St. Mary, which creek empties into
Lynn Canal.

Place of intended use: Grand Reef Quartz Claim.

[In margins:] "Omitted." "Outside Dist."

Locator: Christian G. Grosser.

Date: Oct. 3, 1903.

Filed and recorded: Oct. 12, 1903.

Claim: 10 cubic feet of water per second of time
from Ruby Creek, about $\frac{1}{2}$ mile West of
Browns Camp at the head of Gambia Bay,
Harris Mining District.

Place of intended use: Pearl Mine.

[In margins:] "Omitted." "Outside Dist."

Locator: The Mansfield Gold Mining Co., by Ralph
B. Day.

"Located" Sept, 2, 1903.

Filed and recorded: Oct. 14, 1903.

Claim: 5000 inches of water of McGinnis Creek.

Place of intended use: Mansfield Gold Mining Com-
pany's claims.

[In margin:] "Omitted."

Locators: John Prior, Thos. Smith and John Olds.

"Located" Oct. 27, 1903.

Filed and recorded: Dec. 9, 1903.

Claim: 1000 inches of water of Boulder Creek, which empties into Berners Bay.

Place of intended use: Berners Bay Lode Claim.

[In margins:] "Omitted." "Outside Dist."
[2272]

Locator: Milton Jones.

Page 144

Date: Nov. 21, 1903.

Filed and recorded: Dec. 14, 1903.

Claim: 2000 inches of water of right branch or creek emptying into Lock Mary, Windham Bay.

Place of intended use: Locator's claims.

[In margins:] "Omitted." "Outside Dist."

Locator: R. P. Nelson.

Page 188

"Located" April 1, 1904.

Filed and recorded: April 2, 1904.

Claim: 50 inches of water of small stream near the Northeast end of Fourth Street, Juneau.

Place of intended use: City of Juneau.

Locator: R. P. Nelson.

Page 188

"Located" April 6, 1904.

Filed and recorded: April 7, 1904.

Claim: 100 inches of water of creek situated about $\frac{1}{2}$ mile North of the North boundary of Juneau and empties into Gold Creek.

Place of intended use: City of Juneau.

Locator: A. N. Nadeau. Page 190

Date: April 1, 1904.

Filed and recorded: April 21, 1904.

Claim: 10,000 miners inches of water of Falls Creek
and of Falls Lake, Berners Bay.

[In margins:] "Omitted." "Outside Dist."

Locator: Frank Fremming. Page 190

Date: April 20, 1904.

Filed and recorded: April 22, 1904.

Claim: 10,000 miners inches per second of time of
the waters of Johnson Creek, Berners Bay
Mining District.

Place of intended use: Locator's claims.

[In margins:] "Omitted." "Outside Dist."

[2273]

Locators: F. Bach and P. S. Early. Page 192

Date: April 15, 1904.

Filed and recorded: April 23, 1904.

Claim: 20,000 miners inches of waters of Glacier
Creek.

Page 208

Locators: C. A. Woodruff and E. Owens.

Date: May 27, 1904.

Filed and recorded: June 7, 1904.

Claims: 15,000 inches of water of Powers Creek
Stream.

Place of intended use: Power plant and hydraulic
placer claims.

[In margins:] "Omitted." "Outside Dist."

2542 *Alaska-Juneau Gold Mining Company vs.*

Page 218

Locator: Alaska Treasure Consolidated Mines, by
M. S. Hudson, Superintendent.

Date: August 1, 1904.

Filed and recorded: August 2, 1904.

Claim: 400 miners inches of water of Nevada Creek,
Douglas Island.

Place of intended use: Tide waters of Gastineaux
Channel.

Locator: Richard P. Nelson.

Page 219

Date: August 25, 1904.

Filed and recorded: August 27, 1904.

Claim: 1000 cubic inches per second of water flowing
into and out of tunnel near Juneau City.

Place of intended use: Locator's water system.

Locator: Robt. A. Kinzie.

Page 245

Date: Sept. 13, 1904.

Filed and recorded: Sept. 26, 1904.

Claim: 2000 miners inches of waters of Sherman
Creek near Seward, Alaska

[In margins:] "Omitted." "Outside Dist."

Locator: J. H. Batcheller.

Page 247

Date: Sept. 30, 1904.

Filed and recorded: Oct. 3, 1904.

Claim: 1000 miners inches of waters of Sweeny
Creek, near Seward, Alaska.

[In margins:] "Omitted." "Outside Dist."

Locator: J. H. Batcheller. Page 247

Date: Sept. 28, 1904.

Filed and recorded: Oct. 3, 1904.

Claim: 2000 miners inches of waters of Independence Creek, near Seward, Alaska.

[In margins:] "Omitted." "Outside Dist."

Locator: J. H. Batcheller. Page 248

Date: Sept. 28, 1904.

Filed and recorded: Oct. 3, 1904.

Claim: 2000 miners inches of waters of South Independence Creek, near Seward, Alaska.

[In margins:] "Omitted." "Outside Dist."

Locator: W. B. Hoggatt. Page 265

Date: October 24, 1904.

Filed and recorded: Oct. 26, 1904.

Claim: All the water of Falls Creek, Berners Bay, or as much thereof as to furnish 4000 miners inches of water.

Place of intended use: Albert Lode Claim.

[In margins:] "Omitted." "Outside Dist."

Page 266

Locators: F. L. Goddard, J. W. Brenning and W. A. Berry.

"Located" Oct. 4, 1904.

Filed and recorded: Nov. 4, 1904.

Claim: 1000 miners inches of waters of stream (name unknown) which rises on the

2544 *Alaska-Juneau Gold Mining Company vs.*

West side of the mountain overlooking
the Last Chance Basin, and empties into
said Basin.

Place of intended use: Prosperity Placer Mining
Claim.

Page 268

Locators: F. L. Goddard, J. W. Brenning and W.
Berry.

“Located” Oct. 4, 1904.

Filed and recorded: Nov. 4, 1904.

Claim: 1000 miners inches of waters of stream
(name unknown) which rises on the
West side of the mountain overlooking
Last Chance Basin, and empties into said
Basin.

Place of intended use: Grand View Placer Claim.

[2275]

Page 270

Locators: Chas. Goldstein, John Wagner and H. H.
Folsom.

Date: September 16, 1904.

Filed and recorded: November 18, 1904.

Claim: All the water of Creek to be known as
West Fork, heading on the Northwesterly
side of the Summit of Mt. Juneau, directly
below what is known as the Flag Pole.

Place of intended use: Croesus and Croesus Parallel
Mining Claim.

Locators: Chas. Goldstein, H. H. Folsom and John
Wagner.

Date: September 16, 1904.

Filed and recorded: November 18, 1904.

Claim: All the water of Creek to be known as the
North Fork heading out on the North-
westerly side of the Summit of Mt. Ju-
neau, directly below what is known as the
Granit Point on Mt. Juneau..

Place of intended use: Croesus and Croesus Par-
allel Mining Claims.

Locator: Don S. Rae.

Page 287

Date: January 30, 1905.

Filed and recorded: March 15, 1905.

Claim: 3000 miners inches of water of Lost Rocker
Falls, near Sheep Creek.

Page 288

Locator: R. F. Lewis, by his Atty in Fact, Harry
Bishop.

Date: February 28, 1905.

Filed and recorded: March 17, 1905.

Claim: 5000 inches of water of Salmon Creek.

Place of intended use: City of Juneau. [2276]

2546 *Alaska-Juneau Gold Mining Company vs.*

Locator: W. R. Lindsay.

Page 140

Date: Feb. 22, 1913.

Posted: Feb. 22, 1913.

Filed and recorded: Mar 1, 1913.

Claim: 20,000 miners inches of water flowing in
Tease Creek, "Harris Mining District."

Place of intended use: Point on the shore of Snettisham Bay.

[In margins:] "Omitted." "Outside Dist."

Locator: B. B. Neiding.

Page 144

Date omitted.

Posted: Mar. 8, 1913.

Filed and recorded: Mar. 13, 1913.

Claim: 2000 miners inches of waters of Williams
Creek, which is marked Cascade on marine chart, and is on East side of Berners Bay opposite Jualin Wharf.

Place of intended use: "Beash."

[In margins:] "Omitted." "Outside Dist."

Locator: B. B. Neiding.

Page 144

Date omitted.

Posted: Mar. 8, 1913.

Filed and recorded: Mar. 13, 1913.

Claim: 5000 miners inches of waters of Williams
Creek, which is marked Cascade on marine chart, and is on East side of Berners Bay opposite Jualin Wharf.

Place of intended use: "Beach."

[In margins:] "Omitted." "Outside Dist."

Locator: Gudmund Jensen. Page 170

Date: April 7, 1913.

Filed and recorded: April 17, 1913.

Claim: 50,000 inches of water of Cowee Creek, Berners Bay Mining District.

Place of intended use: Locators mines.

[In margins:] "Omitted." "Outside Dist."
[2277]

Locator: Gudmund Jensen. Page 171

Date: April 7, 1913.

Filed and recorded: April 17, 1913.

Claim: 50,000 inches of water flowing in Cowee Creek, Berners Bay Mining District.

Place of intended use: Locator's mines.

[In margins:] "Omitted." "Outside Dist."

Locator: P. S. Early. Page 172

Date: April 1, 1913.

Filed and recorded: April 19, 1913.

Claim: 5000 inches of water of Southeast fork of Cowee Creek, Berners Bay Mining District.

Place of intended use: Locator's mining properties.

[In margins:] "Omitted." "Outside Dist."

2548 *Alaska-Juneau Gold Mining Company vs.*

Locator: W. R. Lindsay.

Page 173

Date: April 15, 1913.

Posted: April 15, 1913.

Filed and recorded: April 24, 1913.

Claim: 100,000 miners inches of waters flowing in
Hasselborg River & Lake.

Place of intended use: Point near the mouth of said
river.

[In margins:] "Omitted." "Outside Dist."

Locator: Harry Lott.

Page 179

Date: Mar. 5, 1913.

Posted: Mar. 5, 1913.

Filed and recorded: May 12, 1913.

Claim: 500 miners inches of water of "this gulch,"
the mouth of which is about 4000 feet
Northwesterly from Little Sheep Creek.

Place of intended use: Point on the shores of Gasti-
neau Channel. [2278]

Locator: Harry Lott.

Page 180

Date: Mar. 5, 1913.

Posted: Mar. 5, 1913.

Filed and recorded: May 12, 1913.

Claim: 500 miners inches of water flowing in "this
gulch," the mouth of which is about 1500
feet Northwesterly from Little Sheep
Creek.

Place of intended use: Point on shores of Gastineau
Channel.

Locator: Harry Lott. Page 180

Date: Mar. 5, 1913.

Posted: Mar. 5, 1913.

Filed and recorded: May 12, 1913.

Claim: 500 miners inches of water flowing in "this gulch," the mouth of which is about 3000 feet Northwesterly from Little Sheep Creek.

Place of intended use: Point on the shores of Gastineau Channel.

Locator: Harry Lott. Page 181

Date: Mar. 5, 1913.

Posted: Mar. 5, 1913.

Filed and recorded: May 12, 1913.

Claim: 500 miners inches of water flowing in "this gulch," the mouth of which is about 1500 feet Northwesterly from Little Sheep Creek.

Place of intended use: Point on the shores of Gastineau Channel.

Locator: Harry Lott. Page 181

Date: Mar. 5, 1913.

Posted: Mar. 5, 1913.

Filed and recorded: May 12, 1913.

Claim: 1000 miners inches of water flowing in Little Sheep Creek.

Place of intended use: Point on the shores of Gastineau Channel. [2279]

2550 *Alaska-Juneau Gold Mining Company vs.*

Locator: Harry Lott.

Page 182

Date: Mar. 6, 1913.

Posted: Mar. 5, 1913.

Filed and recorded: May 12, 1913.

Claim: 500 miners inches of water flowing in "this gulch," the mouth of which is about 1000 ft. Southerly from Little Sheep Creek.

Place of intended use: Point on shores of Gastineau Channel.

Locator: Harry Lott.

Page 182

Date: Mar. 6, 1913.

Posted: Mar. 6, 1913.

Filed and recorded: May 12, 1913.

Claim: 500 miners inches of water flowing in "this gulch," which is situated about 1500 feet Southerly of Little Sheep Creek.

Place of intended use: Point on the shores of Gastineau Channel.

Locator: Harry Lott.

Page 183

Date: May 8, 1913.

Posted: May. 8, 1913.

Filed and recorded: May 12, 1913.

Claim: 1000 miners inches of water flowing in "this gulch," which flows into Sheep Creek, about 10,000 from its mouth, on the South side.

Place of intended use: Point on the shores of Gastineau Channel.

Locators: W. I. Nelson. Page 191

Date: May 15, 1913.

Filed and recorded: June 23, 1913.

Claim: 500 cubic feet per second of water of Davies
Creek.

Place of intended use: Franklin group of claims.

[In margin:] "Omitted."

[2280]

Page 196

Locator: Alaska Juneau Gold Mining Company.

Posted: Aug. 15, 1913.

Filed and recorded: Aug. 16, 1913.

Claim: 1000 miners inches of water from Woods
Gulch, a branch of Gold Creek.

Place of intended use: Power house on Gastineau
Channel at Southeast end
of Juneau.

Page 203

Locators: T. E. Krigbaum, J. J. Clarke and Geo. R.
Dull.

"Located" Sept. 30, 1913.

Filed and recorded: Oct. 1, 1913.

Claim: 25 miners inches of water flowing in "this
stream," situated on the South slope of
Mount Juneau, on the North side of Gold
Creek, and about three fourths of a mile
from the Town of Juneau.

2552 *Alaska-Juneau Gold Mining Company vs.*

Locator: R. C. Hurley.

Page 221

Date: Jan. 31, 1914.

Posted: Jan. 31, 1914.

Filed and recorded: Feb. 3, 1914.

Claim: 100 cubic feet of water from creek situate
on the Southwest spur of Mount Juneau,
about one quarter mile Northwest of the
town of Juneau.

Page 225

Locator: Alaska Gastineau Mining Company.

Date: Mar. 23, 1914.

Filed and recorded: April 7, 1914.

Claim: All the waters of creek of unknown name
flowing into said creek at point at which
notice is posted, which creek flows from
Mt. Juneau into Gold Creek in the Jualpa
Basin about a mile from Juneau.

Place of intended use: Property of locator.

Locator: R. C. Wilson.

Page 228

"Located" April 2, 1914.

Filed and recorded: April 9, 1914.

Claim: 1000 miners inches of water of Husky Creek,
flowing into Herbert Glacier.

Place of intended use: St. Louis Mine.

[In margins:] "Omitted." "Outside Dist."

[2281]

Locator: Mrs. Ella Herner. Page 235

"Located" April 13, 1914.

Filed and recorded: April 14, 1914.

Claim: The water flowing in streams running
through locator's placer claims, except
enough for domestic use of occupants of
Reynolds and Watts cabins.

Place of intended use: Locator's claims.

[In margin:] "Omitted."

Locators: L. G. Hill, by F. J. Wettrick; W. W.
Casey.

Date: Feb. 11, —.

Filed and recorded: May 11, 1914.

Claim: 500 miners inches of water of "this spring,
creek or channel."

Place of intended use: Irwin and Casey-Shattuck
Additions to Juneau, for
domestic purposes, &c.

Locator: E. P. Pond. Page 254

"Located" May 6, 1914.

Filed and recorded: May 18, 1914.

Claim: 175,000 miners inches or all of the water of
Turner Lake and Turner Creek.

Place of intended use: Shore of Taku Inlet.

[In margin:] "Omitted."

2554 *Alaska-Juneau Gold Mining Company vs.*

Locator: N. O. Warner.

Page 255

Date: Sept. 15, 1913.

Filed and recorded: May 16, 1914.

Claim: water spring from and percolating through the hillside on locator's lot, which is situated immediately at the exterior boundary line of the municipality of Juneau, and at the intersection of the bridge crossing Gold Creek on the road leading to and from the cemetery. [2282]

Place of intended use: Plant of International Fisheries Company situated at Tee Harbor.

[In margin:] "Omitted."

Amended location.

Locator: B. L. Thane.

Page 36

Date omitted.

Posted: Dec. 12, 1911.

Filed and recorded: Dec. 13, 1911.

Claim: 30,000 miners inches of water of Salmon Creek.

Place of intended use: Point near the shore of Gastineau Channel.

Amended location.

Locator: B. L. Thane.

Page 36

Date omitted.

Posted: Dec. 12, 1911.

Filed and recorded: Dec. 13, 1911.

Claim: 25,000 miners inches of water of Salmon
Creek.

place of intended use: Point near the beach of Gas-
tineau Channel.

Page 37

Amended location.

Locator: "Alaska Juneau Gold Mining Company,
by Robt. A. Kinzie, its agent and Gen-
eral Superintendant."

Date omitted.

Posted: Dec. 15, 1911.

Filed and recorded: Dec. 16, 1911.

Claim: 20,000 miners inches of waters of Gold
Creek.

Place of intended use: Alaska Juneau Gold Mining
Company's property.

Page 39

Amended location.

Locator: Alaska Juneau Gold Mining Co., by Robt.
A. Kinzie, its agent and General Supt.

Date omitted.

Posted: Dec. 15, 1911.

Filed and recorded: Dec. 16, 1911.

Claim: 20,000 miners inches of waters of Gold
Creek.

Place of intended use: Alaska Juneau Gold Mining
[2283] Company's property.

Amended location.

Locator: Alaska Juneau Gold Mining Co., by Robt.
A. Kinzie, its agent and General Superintendent.

Date omitted.

Posted: Dec. 15, 1911.

Filed and recorded: Dec. 16, 1911.

Claim: 20,000 miners inches of water flowing
through Nowell Hydraulic Pit, Gold
Creek.

Place of intended use: Alaska Juneau Gold Mining
Company's property.

Amended location.

Locator: Alaska Juneau Gold Mining Co., by Robt.
A. Kinzie, its agent and General Superintendent.

Date omitted.

Posted: Jan. 16, 1912.

Filed and recorded: Jan. 17, 1912.

Claim: 20,000 miners inches of waters flowing
through Nowell Hydraulic Pit, Gold
Creek.

Place of intended use: Alaska Juneau Gold Mining
Company's property.

Locator: B. L. Thane. Page 49

Date: Jan. 18, 1912.

Filed and recorded: Jan. 18, 1912.

Claim: 30,000 miners inches of waters of Salmon
Creek.

Place of intended use: Power plant situated about
2500 feet from the mouth
of Salmon Creek.

Locator: C. R. Carroll. Page 63

Date: May 20, 1912.

Posted: May 20, 1912.

Filed and recorded: June 5, 1912.

Claim: 20,000 miners inches of water of Windfall
Creek.

Place of intended use: Locator's claims.

[In margins:] "Omitted." "Outside Dist."

[2284]

Locator: W. R. Lindsay. Page 64

"Located" June 2, 1912.

Filed and recorded: June 10, 1912.

Claim: 2000 miners inches of water of Sheep Creek.

Place of intended use: Treadwell Mines.

[In margin:] "Omitted."

Amended location.

Locator: Jualin Mines Company, by A. N. Nadeau,
agent and attorney in fact.

Date omitted.

Posted: June 17, 1912.

Filed and recorded: June 18, 1912.

Claim: 1000 miners inches of water of Johnson
Creek, Berners Bay Mining District.

Place of intended use: Undine Mill Site.

[In margins:] "Omitted." "Outside Dist."

Locator: Penn-Alaska Mining Co., by John W. Dudley,
its attorney in fact.

Date omitted.

Posted: June 13, 1912.

Filed and recorded: June 21, 1912.

Claim: 3000 miners inches of water of Rhine Stone
Creek.

Place of intended use: Locator's mining claims situate about one half mile Easterly from Bishop Point, on Taku Inlet.

Page 66

Locator: Penn-Alaska Mining Co., by John W. Dudley, its attorney in fact.

Date omitted.

Posted: June 13, 1912.

Filed and recorded: June 21, 1912.

Claim: 2000 miners inches of water of Grindstone Creek.

Place of intended use: Locator's mining claims situate about one half mile Easterly from Bishop Point, on Taku Inlet.
[2285]

Page 67

Locators: C. W. Young, M. A. Ferris and John Johnston.

Date omitted.

Posted: June 21, 1912.

Filed and recorded: June 25, 1912.

Claim: 10,000 miners inches of water of West fork of McGinnis Creek.

Place of intended use: Montana group of placer claims.

[In margins:] "Omitted." "Outside Dist."

Locators: C. W. Young, M. A. Ferris and John
Johnston.

Date omitted.

Posted: June 21, 1912.

Filed and recorded: June 25, 1912.

Claim: 20,000 miners inches of water of McGinnis
Creek.

Place of intended use: Montana group of placer
claims &c.

[In margins:] "Omitted." "Outside Dist."

Locator: Richard Dorwaldt, agent for Golden Belt
Mining Company.

Date: July 5, 1912.

Filed and recorded: July 18, 1912.

Claim: 5000 miners inches of water of McGinnis
Creek.

Place of intended use: holdings of Golden Belt Min-
ing Company.

[In margins:] "Omitted." "Outside Dist."

Locator: G. J. Swenson, by C. K. Carroll, her at-
torney in fact.

Date omitted.

Posted: July 27, 1912.

Filed and recorded: July 30, 1912.

Claim: 10,000 miners inches of water of Montana
Creek.

Place of intended use: Locator's quartz claims.

[In margins:] "Omitted." "Outside Dist."

Locator: R. G. Wayland.

Date: Aug. 14, 1912.

Posted: Aug. 14, 1912.

Filed and recorded: Aug. 14, 1912.

Claim: 20,000 miners inches of waters of Sheep
Creek.

Place of intended use: Point on shore of Gastineau
Channel at the mouth of
Sheep Creek.

Locator: Alaska Gastineau Mining Company, by B.
L. Thane, manager.

Date: Aug. 21, 1912.

Filed and recorded: Aug. 27, 1912.

Claim: 3000 inches of water of creek of unknown
name located about one mile Northwest of
Sheep Creek.

Place of intended use: Point on shore of Gastineau
Channel between Sheep
Creek and said unknown
creek.

Amended location.

Locator: Peter Reilly.

Date: Aug. 14, 1912.

Filed and recorded: Aug. 26, 1912.

Claim: 20,000 miners inches of waters of Granite
Creek.

Place of intended use: "Near by lode claims."

Locator: R. G. Wayland.

Date: Sept, 12, 1912.

Posted: Sept. 12, 1912.

Filed and recorded: Sept. 14, 1912.

Claim: 5000 cubic feet per minute of water flowing
in creek which flows into Sheep Creek
about 1000 feet from Gastineau Channel.

Place of intended use: Shore of Gastineau Channel
at the mouth of Sheep
Creek. [2287]

Locator: Alaska Juneau Gold Mining Company.

Date: Sept, 3, 1912.

Posted: Sept. 3, 1912.

Filed and recorded: Sept. 9, 1912.

Claim: 7000 miners inches of waters flowing in
Glacier River or Nugget Creek.

Place of intended Use: Locator's property imme-
diately East of Juneau.

Locators: C. W. Young, John Johnson, M. A. Ferris
and Henry States.

Date: Aug. 5, 1912.

Filed and recorded: Sept. 11, 1912.

Claim: 3000 inches of water of left hand fork of Mc-
Ginnis Creek.

[In margins:] "Omitted." "Outside Dist."

Locator: James McCloskey.

Date: Sept. 19, 1912.

Filed and recorded: Sept. 25, 1912.

Claim: 2000 miners inches of waters of Johnson
Creek, Berners Bay.

Place of intended use: shores of Berners Bay.

[In margins:] "Omitted." "Outside Dist."

Locator: James McCloskey.

Date: Sept. 19, 1912.

Filed and recorded: Sept. 25, 1912.

Claim: 2000 miners inches of water of lake which is
about one mile West of Berners Bay upon
the Peninsula lying between Berners Bay
and Lynn Canal.

Place of intended use: shores of Berners Bay.

[In margins:] "Omitted." "Outside Dist."

[2288]

Locators: Wm. Peterson and James McCloskey.

Date: Sept. 19, 1912.

Filed and recorded: Sept, 25, 1912.

Claim: 2000 miners inches of waters of a certain
lake about a mile and a half West of the
shores of Berners Bay on the peninsula
lying between Berners Bay and Lynn
Canal.

Place of intended use: shores of Berners Bay.

[In margins:] "Omitted." "Outside Dist."

Locator: Alaska Juneau Gold Mining Company.

Date: Sept. 18, 1912.

Posted: Sept. 21, 1912.

Filed and recorded: Sept. 30, 1912.

Claim: 4000 miners inches of waters flowing in
Glacier River or Nugget Creek.

Place of intended use: Locator's mines in Silver
Bow Basin and mill site
East of Juneau.

Locator: G. C. Winn.

"Located" Sept. 29, 1912.

Filed and recorded: Oct. 2, 1912.

Claim: 50,000 inches of waters of Carlson Creek, a
tributary of Taku Inlet.

Place of intended use: Taku Inlet or Lower Carl-
son Creek.

[In margin:] "Outside Dist."

Locator: Owen Kirk.

Date: Sept. 19, 1912.

Posted: Sept. 19, 1912.

Filed and recorded: Sept. 26, 1912.

Claim: 5000 cubic feet per minute of water of Gran-
ite Creek.

Place of intended use: Eugene and Eugene Exten-
sion Lodes. [2289]

Locator: C. K. Carroll.

Date: Sept. 1, 1912.

Posted: Sept. 1, 1912.

Filed and recorded: Oct. 14, 1912.

Claim: 10,000 miners inches of water flowing in the
channel of Falls Creek, which empties into
Berners Bay.

Place of intended use: mining claims known as
The A Jax, the B Jax and
the Jungle.

[In margins:] "Omitted." "Outside Dist."

Locator: S. B. Combest.

Date: Oct. 25, 1912.

Posted: Oct. 25, 1912.

Filed and recorded: Oct. 31, 1912.

Claim: 25,000 miners inches of waters of Crater
Creek, "Harris Mining District," which
is about 15 miles N. E. of Snettisham.

Place of intended use: Point near the mouth of
Crater Creek.

[In margins:] "Omitted." "Outside Dist."

Locator: S. B. Combest.

Date: Oct. 24, 1912.

Posted: Oct. 24, 1912.

Filed and recorded: Oct. 31, 1912.

Claim: 50,000 miners inches of water of Long Creek,
"Harris Mining District," which is about
17 miles N. E. of Snettisham.

Place of intended use: Point about one mile S. E.
of the outlet of Crater
Lake.

[In margins:] "Omitted." "Outside Dist."

Locator: C. R. Carrol.

Date: Sept. 29, 1912.

Filed and recorded: Nov. 8, 1912.

Claim: 5000 miners inches of waters flowing in the
channel of Saw Mill Creek, Berners Bay
Mining District.

Place of intended use: Locator's quartz mining
claims.

[In margins:] "Omitted." "Outside Dist."

[2290]

Locator: Alaska Gastineau Mining Company.

Date: Jan. 7, 1913.

Filed and recorded: Jan 21, 1913.

Claim: 3000 inches of water flowing in creek of un-
known name located about 2 miles North-
west of Sheep Creek.

Place of intended use: Sheep Creek Camp.

Locator: Alaska Gastineau Mining Company.

Date: Jan. 7, 1913.

Filed and recorded: Jan 21, 1913.

Claim: 3000 inches of water of creek of unknown name located about $2\frac{1}{2}$ miles Northwest of Sheep Creek.

Place of intended use: Sheep Creek camp.

Locator: John Wagner.

Date: Feb. 18, 1913.

Filed and recorded: Feb. 20, 1913.

Claim: All the waters running in each and every of the draws, ravines, gullies and depressions on the Southwesterly slope of Mt. Juneau commencing at the center of the Southeastely end lines of the Boston King Extension No. 2 lode claim and running thence Southeasterly along said mountain slope at a grade of about 6/100 of a foot to the rod.

Place of intended use: Boston Mining Property on Gold Creek.

Locator: G. C. Jones.

Date: Feb. 15, 1913.

Filed and recorded: Feb. 20, 1913.

Claim: 50 cubic feet per second of water running in
Woods Gulch.

Place of intended use: "T" Mill site, situated on
North shore of Gastineau
Channel one half mile
from the Court House of
Juneau.

[2291]

Locator: G. C. Jones.

Date: Feb. 15, 1913.

Filed and recorded: Feb. 20, 1913.

Claim: 50 cubic feet per second of water running in
stream named Eve.

Place of intended use: "T" Mill site, situated on the
North shore of Gastineau
Channel about one half
mile from the Court of
Juneau.

Locator: G. C. Jones.

Date: Feb. 15, 1913.

Filed and recorded: Feb. 20, 1913.

Claim: 50 cubic feet of water running in stream
named Adam.

Place of intended use: "T" Mill site which is situated on the North shore of Gastineau Channel one half mile from the court house of Juneau.

Page 139

Locator: Alaska Gastineau Mining Company.

Date: Feb. 10, 1913.

Filed and recorded: Feb. 28, 1913.

Claim: 40,000 inches of water of Carlson Creek.

Place of intended use: Point near the mouth of said creek upon Taku Inlet.

[In margin:] "Outside Dist."

Page 140

Locator: W. R. Lindsay.

Date: Feb. 22, 1913.

Posted: Feb. 22, 1913.

Filed and recorded: Mar. 1, 1913.

Claim: 200,000 miners inches of waters flowing in Speel River.

Place of intended use: Point on said river about 4 miles above the mouth thereof.

[In margins:] "Omitted." "Outside Dist."

[2292]

Page 139

Locators: J. H. Stephens and Tom Dull.

"Located" July 14, 1908.

Filed and recorded: Aug. 8, 1908.

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Claim: 1500 inches of water from creek that empties
into Auk Bay.

Place of intended use: Auk Bay.

[In margin:] "Omitted."

Page 141

Locator: Robt. A. Kinzie.

Date: Aug. 9, 1908.

Filed and recorded: Aug. 20, 1908.

Claim: 50,000 miners inches of water of Twin Creek,
near Juneau.

Place of intended use: shores of Taku Inlet, Doug-
las Island and through-
out Harris Mining Dis-
trict.

[In margin:] "Omitted."

Page 141

Locator: Robt. A. Kinzie.

Date: Aug. 9, 1908.

Filed and recorded: Aug. 20, 1908.

Claim: 100,000 miners inches of water of Lake Tur-
ner, near Juneau.

Place of intended use: Taku Inlet, Douglas Island
and throughout Harris
Mining District.

[In margin:] "Omitted."

Locator: Robt. A. Kinzie by Geo. H. Wayland, his attorney in fact.

Date: Sept. 9, 1908.

Filed and recorded: Sept. 15, 1908.

Claim: 10,000 miners inches of water of Kar Creek near Juneau.

Place of intended use: Shores of Taku Inlet, Douglas Island and throughout the Harris Mining District.

[In margin:] "Omitted."

Locators: F. M. Shaw and G. Hain.

"Located" Dec. 1, 1908.

Filed and recorded: Dec. 29, 1908.

Claim: 800 miners inches of water from Ruby Creek, Prairie Basin, about 3 miles S. E. of T Harbor.

Place of intended use: Ruby Creek Placer.

[In margins:] "Omitted." "Outside Dist."

[2293]

Locators: Wm. Stubbins and L. H. Keist, for the City of Douglas.

Date: Feb. 23, 1909.

Filed and recorded: Feb. 24, 1909.

Claim: 500 miners inches of water flowing in Bear Creek.

Place of intended use: City of Douglas.

Locator: Jesse Blakely.

Date: May 7, 1909.

Filed and recorded: May 8, 1909.

Claim: 1500 miners inches of water of Granite Creek.

Place of intended use: About 100 feet above Nowell
Dam in said Creek.

Locators: Neil McCush and E. J. Margrie.

“Located” May 17, 1909.

Filed and recorded: May 19, 1909.

Claim: 50,000 miners inches of water from McCush
Lake and all the waters flowng into the sd
Lake from the adjacent water sheds and
various sources. Said lake is situated
above Auk Bay, Harris Mining District.

Locator: John Clark.

Date: July 21, 1909.

Filed and recorded: Sept. 1, 1909.

Claim: 30,000 miners inches of water of South fork
of Eagle River.

[In margin:] “Omitted.”

Locator: A. L. Atkinson.

"Located" 8-27-1909.

Filed and recorded: Sept. 1, 1909.

Claim: 10,000 miners inches of water of Sheep Creek.

Place of intended use: Power plant on Gastineaux
Channel.

[2294]

Locators: C. F. Stites and John W. Clark.

Date: July 21, 1909.

Filed and recorded: Sept. 20, 1909.

Claim: 2000 miners inches of waters of Granite
Creek.

[In margin:] "Omitted."

Locator: J. B. Martin.

"Located" Sept. 28, 1909.

Filed and recorded: Oct. 6, 1909.

Claim: 5000 miners inches of water per second of
time from Ready Bullion Creek.

Locators: William C. Miller, George Reidi, F. E.
Koeper and J. O. Ramstad.

"Located" Sept. 13, 1909.

Filed and recorded: Oct. 20, 1909.

Claim: All of the waters of North Windfall Creek
at Windfall Harbor, Harris Mining Dis-
trict.

[In margins:] "Omitted." "Outside Dist."

2574 *Alaska-Juneau Gold Mining Company vs.*

Page 170

Locators: Chris Radmilovich and Noj. Pizete.

Date: Feb. 15, 1910.

Filed and recorded: Feb. 16, 1910.

Claim: 500 inches of water of Crosscut Bay Creek,
Harris Mining District.

Page 171

Locators: Jacob H. Dull and Thomas Dull.

Date: Feb. 17, 1910.

Filed and recorded: Feb. 25, 1910.

Claim: 100 cubic feet of water per second of time of
Lemon Creek.

Place of intended use: Long Chance placer &c.

[2295]

Page 171

Locator: W. N. Lazier.

Date: Mar. 16, 1910.

Filed and recorded: Mar. 16, 1910.

Claim: 400 inches of water of certain creek emptying
into Tee Harbor on East side thereof.

[In margins:] "Omitted." "Outside Dist."

Page 173

Locator: Arthur L. Pearse.

Date: Mar. 29, 1910.

Filed and recorded: April 19, 1910.

Claim: 400 inches of water of South West Fork of
Nevada Creek, Douglas Island.

Place of intended use: Alaska Treasure Gold Min-
ing Co.

Locator: L. D. Mulligan.

Date: Aug. 1, 1910.

Filed and recorded: Aug. 8, 1910.

Claim: 20,000 miners inches of waters of Gold Creek.

Locator: International Fisheries Company by William N. Lazier, agent and attorney in fact.

Date: July 21, 1910.

Posted: July 25, 1910.

Filed and recorded: Aug. 11, 1910.

Claim: All the water of lake situated at top of mountain immediately East of Tee Harbor, and all water flowing into said lake.

Place of intended use: Plant of International Fisheries Company.

[In margins:] "Omitted." "Outside Dist."

Locator: International Fisheries Company, by William N. Lazier, its atty. in fact and agent.

Date: July 21, 1910.

Posted: July 25, 1910.

Filed and recorded: Aug. 11, 1910.

Claim: All the water of lake situated at the top of

2576 *Alaska-Juneau Gold Mining Company vs.*

a mountain immediately East of Tee Harbor; and all water flowing into said lake.

[In margins:] "Omitted." "Outside Dist."

[2296]

Place of intended use: Plant of International Fisheries Co.

Page 179

Locator: International Fisheries Company, by William Lazier, its agent and atty. in fact.

Date: July 21, 1910.

Posted: July 25, 1910.

Filed and recorded: Aug. 11, 1910.

Claim: All the water of lake situated on the top of the mountain immediately East of Tee Harbor; and all the water flowing into said lake.

Place of intended use: plant of the International Fisheries Co.

[In margins:] "Omitted." "Outside Dist."

Page 179

Locator: International Fisheries Company, by William N. Lazier, its agent and atty. in fact.

Date: July 21, 1910.

Posted: July 25, 1910.

Filed and recorded: Aug. 11, 1910.

Claim: All the water of lake situated on the top of the mountain immediately East of Tee Harbor; and all the water flowing into said lake.

Place of intended use: Plant of International Fisheries Co.

[In margins:] "Omitted." "Outside Dist."

Page 180

Locator: International Fisheries Company, by William N. Lazier, its agent and atty. in fact.

Date: July 21, 1910.

Posted: July 25, 1910.

Filed and recorded: Aug. 11, 1910.

Claim: All the water of "this stream" which is near a lake 700 feet above and immediately East of the Southern portion of Tee Harbor, Alaska.

Place of intended use: Locator's plant at Tee Harbor.

[In margins:] "Omitted." "Outside Dist."

[2297]

Page 180

Locator: George E. Bent.

Date: Aug. 15, 1910.

Posted: Aug. 15, 1910.

Filed and recorded: Aug. 17, 1910.

Claim: 1000 miners inches of water of stream flowing into Gold Creek, at a point about 1-1/3 miles from the mouth thereof.

Page 181

Locator: George E. Bent.

Date: Aug. 15, 1910.

Posted: Aug. 15, 1910.

Filed and recorded: Aug. 17, 1910.

Claim: 1000 miners inches of water of stream flowing into Gold Creek about 1 1/4 miles from mouth thereof.

Locator: Ebner Gold Mining Company, by John R.
Winn, its agent and attorney.

Date: Aug. 17, 1910.

Posted: Aug. 17, 1910.

Filed and recorded: Aug. 17, 1910.

Claim: All the waters of Gold Creek, to its entire
flow during all seasons and at all time or
times that said corporation is not already
entitled to by reason of prior right or prior
location or appropriation, &c.

Place of intended use: Ebner Gold Mining Com-
pany's mines.

Locator: L. C. Bach.

Date: July 26, 1910.

Filed and recorded: Sept. 2, 1910.

Claim: 3000 inches of water per second of time of
Marble River, about 25 mines South of
Juneau.

Place of intended use: Marble Mountain Quarries &c.

[2298]

Locator: W. R. Lindsay.

"Located" Aug. 1, 1910.

Filed and recorded: Sept. 24, 1910.

Claim: 20,000 miners inches of water of Nugget
Creek.

Locator: Sam Jurich.

"Located" Oct. 10, 1910.

Filed and recorded: Oct. 11, 1910.

Claim: "All the water flowing undiverted in" San
Jurick Creek, Douglas Island.

Place of intended use: Beach of Gastineau Channel
on Eastern side of Douglas
Island about 3000 feet
North of Nevada Creek.

Locator: H. T. Tripp.

Date: June 20, 1910.

Filed and recorded: Oct. 25, 1910.

Claim: 10,000 miners inches of water flowing in Gold
Creek.

Place of intended use: Ebner Mine.

Locator: Chas. Perelle.

Date: Oct. 29, 1910.

Filed and recorded: Nov. 1, 1910.

Claim: 100 cubic feet of water per second of time of
Lemon Creek.

Place of intended use: Plant about a half mile from
the dam now built.

Locator: Louis G. Thomas.

Date: June 2, 1911.

Filed and recorded: Jan. 3, 1911.

Claim: 4500 miners inches of water of Jarmy Creek,
which is first creek on the East shore North
of the Point Sherman light house and is
a Comet in Berners Bay Mining District.

Place of intended use: Locator's mining grounds.

[In margins:] "Omitted." "Outside Dist."

[2299]

Locator: H. J. Maycock.

"Located" Jan. 6, 1911.

Filed and recorded: Jan. 9, 1911.

Claim: All the water flowing in Grindstone Creek,
near point where Taku Arm and Gastineau
Channel intersect.

[In margin:] "Omitted."

Amended location.

Locator: Alaska Juneau Gold Mining Company, by
Robt. A. Kinzie, agent and general
superintendent.

Posted: May 8, 1911.

Filed and recorded: May 8, 1911.

Claim: 20,000 miners inches of waters of Gold Creek.

Place of intended use: Point at or near Jorgenson
saw mill on the shore of
Gastineaux Channel and
other points.

Locator: H. L. Wollenberg.

Posted: June 3, 1911.

Filed and recorded: June 12, 1911.

Claim: 1000 miners inches of water of Sherman
Creek.

Place of intended use: Beach on Lynn Canal near
the mouth of Sherman
Creek.

[In margins:] "Omitted." "Outside Dist."

Locator: Alaska Treadwell Gold Mining Company,
Alaska Mexican Gold Mining Company
and Alaska United Gold Mining Com-
pany.

Date: June 13, 1911.

Posted: June 15, 1911.

Filed and recorded: June 9, 1911.

Claim: 20,000 miners inches of waters flowing in
Glacier River or Nugget Creek.

Place of intended use: Point half a mile below
where said stream comes
from under the Menden-
hall Glacier.

Locator: Martin Damourette.

Date: July 12, 1911.

Filed and recorded: July 20, 1911.

[2300]

2582 *Alaska-Juneau Gold Mining Company vs.*

Claim: 500 miners inches of water from Damourette Creek.

Place of intended use: Damourettes Discovery Placer Claim.

[2301]

Water locations contained in Volume 11 of Placer, Water and Mill Site Locations.

Page 8

Locator: Henry States.

Date omitted.

Filed and recorded: July 31, 1911.

Claim: 2000 inches of water of "deep creek that enters into Hawkes Inlet near the entrance Admiralty Is., Harris Mining District, Alaska."

[In margins:] "Omitted." "Outside Dist."

Page 12

Locator: L. P. Shackelford.

Date: Aug. 25, 1911.

Filed and recorded: Aug. 28, 1911.

Claim: 500 miners inches of water of Auk Creek.

Place of intended use: Saltwater Jack group of lode claims.

Locator: John W. Clark.

Date: Oct. 8, 1911.

Filed and recorded: Oct. 12, 1911.

Claim: 30,000 inches of water of Carlson Creek.

Place of intended use: "Generating plant for
quartz claims."

[In margin.] "Outside Dist."

Locator: Harry Lott.

"Located" Aug. 11, 1911.

Filed and recorded: Nov. 9, 1911.

Claim: 2000 miners inches of water of head waters
of Sheep Creek Basin.

[In margin:] "Omitted."

Locator: International Fisheries Company, by its
agent and attorney in fact W. N.
Lazier.

Date: Aug. 24, 1911.

Posted: Sept. 4, 1911.

Filed and recorded: Nov. 27, 1911.

Claim: All the water of lake situate on the top of the
mountain at Tee Harbor, Alaska; also all
the water flowing into said lake.

[In margins:] "Omitted." "Outside Dist."

[2302]

WATER LOCATIONS CONTAINED IN VOL-
UME 7 (J) OF LODE LOCATIONS.

Page 136

Locator: W. F. Reed, per S. B. R.

Date: May 17, 1890.

Filed and recorded: May 28, 1890.

Claim: 500 miners inches of water of Robbins
Creek.

Place of intended use: Tennessee lode or ledge mill.

[In margin:] "Outside H. M. D."

[2303]

WATER LOCATIONS CONTAINED IN VOL-
UME 8 (M) OF LODE LOCATIONS.

Page 187

Locators: Edward Webster and W. A. Sanders.

"Located" Sept. 18, 1891.

Filed and recorded: Sept. 22, 1891.

Claim: All water flowing in Gold Creek at Webster
Mill Site. Lot No. 76B. 200 feet above
the dam of the "Webster Quartz Mill."

[2304]

WATER LOCATIONS CONTAINED IN VOL-
UME 9 (P) OF LODE LOCATIONS.

Page 52

Locator: Fred A. Rice

"Located" Jan. 1, 1893.

Filed and recorded: Jan. 5, 1893.

Claim: 1000 inches of waters of Gold Creek.

Place of intended use: Point at mouth of Gold Creek where said creek flows out of Gold Creek canyon into the flat on the East shore of Gastineaux Channel.

[2305]

WATER LOCATIONS CONTAINED IN VOLUME 11 OF LODE LOCATIONS.

Page 33

Locator: Richard Johnson.

Date: Aug. 20, 1895.

Filed and recorded: Sept. 16, 1895.

Claim: All the water flowing in Johnson Creek, Berners Bay.

Place of intended use: "Power House."

[In margin:] "Outside H. M. D."

[2306]

WATER LOCATIONS CONTAINED IN VOLUME 14 OF LODE LOCATIONS.

Page 29

Locators: Denis McLaughlin, John McLaughlin and Dan Sullivan.

Date: June 21, 1898, at "William Henry Bay, Harrison District."

Filed and recorded: July 8, 1898.

Claim: 3000 inches of water of unnamed creek.

Locators: Denis McLaughlin, John McLaughlin
and Dan Sullivan and Jerome Mc-
Cluskey.

Date: June 21, 1898, at "William Henry Bay,
Harrison District."

Filed and recorded: July 8, 1898.

Claim: 4000 inches of water on creek, unnamed.

Locators: Denis McLaughlin, John McLaughlin
and Dan Sullivan.

Date: June 21, 1898.

Filed and recorded: July 8, 1898.

Claim: 3000 inches of water of creek located on
William Henry Bay,
"Harrison District."

Locators: Denis McLaughlin, John McLaughlin
and Dan Sullivan.

"Located" June 24, 1898.

Filed and recorded: July 8, 1898.

Claim: 4000 inches of water on creek located at
William Henry Bay,"
"Harrison District."

WATER LOCATIONS CONTAINED IN VOL-
UME 15 OF LODE LOCATIONS.

Page 200

Locator: P. S. Early.

Date: Jan. 1, 1900.

Filed and recorded: Jan. 18, 1900.

Claim: 1000 cubic inches per second of water of
"this stream."

Place of intended use: Mill "sight" at forks of
Kowie Creek and foot of
Yankee Basin Mountain,
8 miles Southeast of Ber-
ners Bay.

[In margin:] "Outside H. M. D."

[2308]

WATER LOCATIONS CONTAINED IN VOL-
UME 20 OF LODE CLAIMS.

Page 169

Locator: Alaska Juneau Gold Mining Co.

Date: Nov. 5, 1911.

Filed and recorded: Nov. 9, 1911.

Claim: 20,000 miners inches of water flowing in
Gold Creek.

Place of intended use: Aurora Lode Mining Claim.

Locator: Alaska Juneau Gold Mining Co.

Date: Nov. 5, 1911.

Filed and recorded: Nov. 9, 1911.

Claim: 20,000 miners inches of water flowing
through Nowell Hydraulic pit, about 4
miles up Gold Creek.

Place of intended use: Aurora Lode Mining Claim.

Locator: Alaska Juneau Gold Mining Co.

Date: Oct. 31, 1911.

Filed and recorded: Nov. 9, 1911.

Claim: 20,000 miners inches of waters of Gold
Creek.

Place of intended use: Aurora Lode Mining Claim.

Locator: B. L. Thane, by J. R. Whipple, Attorney
in fact.

Date: Jan. 18, 1912.

Filed and recorded: Jan. 18, 1912.

Claim: 30,000 miners inches of water flowing in Sal-
mon Creek.

Place of intended use: Power plant situated about
2500 feet from the mouth
of Salmon Creek. [2309]

WATER LOCATIONS CONTAINED IN VOLUME 2 (B) OF LODE CLAIMS.

Page 121

Locator: Charles Brown.

Date: Dec. 2, 1882.

Filing and Recording Date: December ———

Claim: Three miles of Takow River.

Purpose: Fishing and catching salmon and other fish.

Note: Date of posting omitted.

Page 135

Locator: M. W. Murry.

"Located and claimed" Mar. 31, 1883.

Filing and recording date: April 8th, 1883.

Claim: "all the waters of this creek for milling and mining purposes," &c.

Name of claim: Black Bear Right, Douglas Island, Alaska.

Page 135

Locator: M. W. Murry.

"Located and claimed" Apr. 7, 1883.

Filing and recording date: April 8, 1883.

Claim: "All the waters of this creek for milling and mining purposes," &c.

Name of claim: Bears Nest Right, Douglas Island, Alaska.

Locator: G. W. Pickett.

"Located" May 9, 1884.

Filing and recording date: May 13, 1884.

Claim: "the water of this creek (Fall Creek) for mining and milling purposes; also all of the water of all gulches and all seepage water on line of ditch. Said ditch to be constructed to the Oro Fino and Mexican Mines. The above creek is situated on Douglas Island."

Locator: J. Treadwell, Supt. Alaska Mill and Mining Co.

"Located" May 15th, 1884.

Filing and recording date: May 18, 1884.

Claim: "All of the water of this creek (Bear Creek) for mining and saw mill purposes."

Defts. Exhibit No. R 2 X. Received in evidence Aug. 13, 1914. In Case 1074-A. J. W. Bell, Clerk. By J. T. Reed, Deputy.

[2310]

Place of intended use: "About 200 yards from mouth of Creek." Douglas Island.

Locators: H. H. Edwards and Phillip Starr.

"Located" May 30, 1884.

Filing and recording date: June 5, 1884.

Claim: "All of the water in this creek (Nevada Creek) to be taken out at notice above the

Bullion and Alaska Quartz Mines. Notice for mining and milling purposes. Said creek situated on Douglas Island, Harris Mining District, Alaska Territory.

Page 203

Locators: Ed. Alyward and John McLaughlin.

Date: June 9, 1884.

Filing and recording date: June 12, 1884.

Claim: "4000 inches of water at the mouth of this lake for milling purposes."

Page 219

Locator: M. W. Murray.

"Located" August 16th, 1884.

Filing and Recording Date: August 25, 1884.

Claim: "The water of this creek (the first large creek above the Cowhee Creek and known as the Eagle Creek" for mining and milling purposes."

Page 222

Locator: M. W. Murray.

"Located" Sept. 18, 1884.

Filing and recording date: September 26, 1884.

Claim: "All the water of this creek (the first large creek above the Cowhee North West and known as the Eagle Creek) for milling and mining purposes.

Locator: G. W. Pickett.

"Located" Sept. 29, 1884.

Filing and recording date: September 30, 1884.

Claim: "All the water of this creek for mining and milling purposes to be brought in a ditch to connect with Oro Fino & Mexican Co. Ditch." Said creek is situated on Douglas Island, Alaska, about two miles Southeast of Fall Creek and known as Deer Creek.

[2311]

Date: Nov. 4, 1881.

Filed and recorded: Nov. 4, 1881.

Claim: 1000 inches of water belonging to Prospect Gulch.

Locator: John Jackson.

"Located" May 13, 1882.

Filed and recorded: May 13, 1882.

Claim: 1000 inches of water flowing to Coween Creek, Douglas Island, Harris Mining District, Alaska Territory.

Locator: Nath. Hilton.

Date: July 2, 1883.

Filed and recorded: July 3, 1883.

Claim: "500 inches of water for mining and milling purposes, at this point, about 1000 feet

above Dix & Co. Claim, to be taken from Gold Creek (in Silver Bow Basin) in ditch and extending along East bank of creek.

Page 277

Locator: M. W. Murry.

"Located" Sept. 28, 1883.

Filed and recorded: Sept. 29, 1883.

Claim: "All the water of this creek (Big Creek) Douglas Island for milling and mining purposes."

Page 277

Locator: M. W. Murry.

"Located" Sept. 28, 1883.

Filed and recorded: Sept. 28, 1883.

Claim: "All the water of this creek, Cowhee Creek, Douglas Island, for mining and milling purposes."

Page 279

Locators: H. H. Edwards, R. L. Hobert, F. A. Perke.

Date: April, 1, 1881.

Filed and recorded: April 10, 1881.

Claim: "The water of this creek (supposed to be Salmon Creek) for mill purposes: Commencing at this point of rock at the head of the falls running down the creek to the lower falls to the point below said falls designated as Mill Site, distant say one half mile."

2594 *Alaska-Juneau Gold Mining Company vs.*

Locators: J. D. Sage Miller, Chas. Wells, Jo. Juneau, and R. T. Harris. [2312]

Filed and recorded: May 19, 1881.

Claim: "All the water of this gulch for milling purposes": Said water-right is in conjunction with the Takow Union Gold & Silver Quartz Mine and is situated about half a mile from Harrisburg on the Southeast side of Gold Creek in Harris Mining District, Alaska.

Page 282

Locator: E. Bean.

Date: June 7, 1881.

Filed and recorded: June 19, 1881.

Claim: 1500 inches of the water of creek to be known as Hayes Creek on Douglas Island, A. T., to be conveyed in a ditch down to the salt water for the purpose of milling and mining.

Page 287

Locator: Dennis De Porte

Date: Oct. 31, 1881.

Filed and recorded: Novr. 3d, 1881.

Claim: 2000 inches of water to be taken out of Gold Creek at or near a large granite boulder about 150 feet above this notice.

Place of intended use: Cosmopolitan Mill Site situated about 500 feet below Snow Slide Gulch.

Locator: S. Lewis.

Date: Oct. 31, 1881.

Filed and recorded: Nov. 3, 1881.

Claim: "Small streams for mining purposes running on" ground of Western Mill Site, situated just above the big falls of Gold Creek.

Locators: Frank Berry, James Rosewall, John Prior, Antone Marks and William Meeham.

Date: Nov. 8, 1881.

Filing and recording date: Nov. 8, 1881.

Claim: 1000 inches of water from Ready Bullion Creek for the benefit of the Ready Bullion Quartz location, the Golden Chariot Quartz Location and the Placer Mining Location, located on the Ready Bullion Beach; also all the waters of sd Bullion Creek for mining and milling purposes.

Locator: John Galliger. [2313]

Date: Nov. 9, 1881.

Filed and recorded: Nov. 13, 1881.

Claim: 400 inches of the water of Paris Creek for milling and mining.

Locator: W. W. Harper.

"Located" Jan. 12, 1882.

Filed and recorded: March 27, 1882.

Claim: 400 inches of water in Bonanza King Gulch
for quartz mining purposes.

Locator: J. Treadwell.

"Located" April 11, 1882.

Filed and recorded: April 11, 1882.

Claim: 1500 inches of the water of Bear Creek, situated on Douglas Island about one quarter of a mile West of Juneau Island; to be used for mining and milling purposes.

Locators: W. I. Webster and W. F. Lockwood.

Located: May 1, 1882.

Filed and recorded: May 11, 1882.

Claim: 2000 inches of water of Gold Creek, Harris Mining District, to be taken out at a point rocks about fifty feet above the dam on said Gold Creek and on the Julia Quartz Ledge for the purpose of milling and mining.

Locator: J. Treadwell.

"Located" April 11, 1882.

Filed and recorded: April 11, 1882.

Claim: 2000 inches of water of Big Creek, Douglas Island. [2314]

WATER LOCATIONS CONTAINED IN VOL-
UME 4 (BI) OF LODE LOCATIONS.

Page 19

Locators: S. Lewis and Phil Starr, by J. H. Mc-
Cormick.

Date: Nov. 23, 1886.

Filed and recorded: Jan. 31, 1887.

Claim: 1000 inches of water of "this creek."

Place of intended use: Alaska Quartz Mining Loca-
tion. [2315]



In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1074-A.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

EBNER GOLD MINING COMPANY, a Corporation,
et al.,

Defendants.

**Certificate of Stenographer to Transcript of
Testimony.**

I do hereby certify that I am the official court stenographer for the First Judicial Division, Territory of Alaska; that the Honorable Robert W. Jennings, the Judge before whom the trial of the above-entitled cause was had, was, at the time of the trial of said cause, and now is, the regular presiding Judge of the First Judicial Division; that I reported the trial and proceedings in the above-entitled cause and that the foregoing is a full, true and correct transcript of all of the testimony and evidence introduced or offered at the trial of said cause, together with all of the exhibits on which the same was heard.

Dated this 20th day of December, 1915.

L. O. GREEN. [2317]

Findings of Fact Requested by Plaintiff.

Be it further remembered that the above and foregoing, being all the evidence adduced, the plaintiff

requested the Court to make and adopt the following Findings of Fact:

Plaintiff then and there requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER ONE.

The Court finds that the plaintiff is a corporation duly organized and existing under and by virtue of the laws of West Virginia and doing business in the Territory of Alaska with its principal place of business at Juneau; that the plaintiff has paid the license fee for the year 1913 and the annual license due January 1, 1914, for the year 1914 as provided for by Chapter Eleven (11) of the 1913 Session laws of the Territory of Alaska, and is authorized to sue in the Territory of Alaska, which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number One requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as set forth in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TWO.

The Court finds that the defendant, Ebner Gold Mining Company, is a corporation duly organized

and existing and doing business in the Territory of Alaska,

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number One requested by the plaintiff, on the ground that said Finding is [2318] upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as set forth in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER THREE.

The Court finds that the defendant, Alaska Ebner Gold Mines Company, is a corporation duly organized and existing and doing business in the Territory of Alaska.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Three requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER FOUR.

The Court finds that the defendant, Angus Mackey, was duly and regularly appointed, on the 29th day of June, 1912, by an Order of this Court made and entered in the case of Valdemar T. Hammer, plaintiff, vs. Alaska Ebner Gold Mines Company, defendant, an action then pending in this Court as case No. 928-A, as receiver for the Alaska-Ebner Gold Mining Company, and did on the first day of July, 1912, take his oath of office, and in all respects duly qualify as such Receiver, and is now the duly acting and qualified Receiver for the Alaska-Ebner Gold Mines Company; and that leave of Court has been duly obtained to sue him as such Receiver. [2319] which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number Four requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER FIVE.

The Court finds that Gold Creek is a natural stream of water, having its source in the mountains situate above Silver Bow Basin, a few miles easterly from the Town of Juneau, Alaska, from whence it flows through a series of basins and canyons in a westerly direction into Gastineau Channel, an arm of the Pacific Ocean, collecting the waters of various small streams and tributaries along its course,

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number Five requested by the plaintiff, on the ground that said Finding is upon material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER SIX.

The Court finds that the waters of Gold Creek were flowing in their natural channel at the point of diversion and appropriation, elsewhere in these Finding more particularly [2320] designated, on the first day of August, 1910; that on the said first day of August, 1910, *that on the said first day of*

August, 1910, while the said waters were flowing in their natural channel, as aforesaid, one L. D. Mulligan, who was acting in that behalf as the agent and employ and representative of the plaintiff corporation, located, claimed and appropriated twenty thousand miners inches of the waters flowing in Gold Creek at the point of diversion, elsewhere in these Findings more specifically defined, said waters so appropriated to be used in connection with the mining and milling of ores from the plaintiffs' mine in the manner elsewhere in these Findings more particularly described. And the Court finds that the said Mulligan did then and there, acting for and on behalf of plaintiff as aforesaid, post a notice on the right hand bank of Gold Creek, going up stream, at a point a short *distan* distance above where the dam of the Alaska-Juneau Gold Mining Company has since been constructed and is now maintained; the same being approximately a mile easterly and up stream from the town of Juneau and a short distance up stream from the portal of the Alaska-Juneau Tunnel, situate on the Colorado lode mining claim; that the said notice so posted by the said Mulligan is in words and figures as follows, to wit:

KNOW ALL MEN BY THESE PRESENTS: That I, L. D. Mulligan, of Alaska, a Citizen of the United States, and over the age of twenty-one years, have appropriated and claimed 20,000 miner's inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a

point indicated by this notice posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

(Signed) L. D. MULLIGAN.

Dated Aug. 1st, 1910.

That said above-described notice was on the 8th day of August, 1910, duly and regularly recorded in the office of the Recorder for the Juneau Recording District, which said Recording District embraces the territory through which Gold Creek flows. [2321]

Which said Finding the Court then and there refused to make.

The plaintiff, by Counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number Six requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding,

Which exception was then and there allowed by the Court.

The plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER SEVEN.

The Court finds that said L. D. Mulligan affixed his own name to said notice of appropriation, (whereas he was, in truth and in fact, acting as agent and representative of the plaintiff in that behalf); whereupon the said L. D. Mulligan, in order to place the legal and record title, to the rights acquired by

him, in the plaintiff, made, executed and delivered to the plaintiff, on the 2d of August, 1910, his certain deed, conveying and quitclaiming to the plaintiff all his right, title and interest in and to the rights acquired under and by virtue of the steps taken by him as aforesaid,

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number Seven requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding,

Which Exception was then and there allowed by the Court. [2322]

The plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER EIGHT.

The Court further finds that on the 8th day of May, 1911, the plaintiff posted an amended notice of appropriation at or near the point of diversion in these findings more particularly described, which said amended notice of appropriation is in words and figures as follows, to wit:

NOTICE IS HEREBY GIVEN, that, whereas, the Alaska Juneau Gold Mining Company did, by its agent, L. D. Mulligan, posting a notice claiming and appropriating 20,000 inches of water from the

waters *flowing* Gold Creek, which notice is in words and figures as follows:

“KNOW ALL MENT BY THESE PRESENTS: That I, L. D. Mulligan, of Alaska, a citizen of the United States and over the age of twenty-one years, have appropriated and claimed 20,000 miners inches, of the water of Gold Creek, near Juneau, Alaska, to be used for Mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated in this notice, posted on a tree and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

L. D. MULLIGAN.

Dated Aug. 1st, 1910.”

And, whereas, the said L. D. Mulligan acted as the agent of the undersigned in this connection, who is now the owner and holder of said right so located by said Mulligan by virtue of such agency and by virtue of conveyances from said Mulligan;

Now, therefore, the undersigned, not waiving any of its rights or abandoning any of the rights belonging to it under and by virtue of said above described notice and the work of diverting the water of Gold Creek appropriated by reason thereof, and done pursuant thereto, but for the purpose of giving a more accurate and detailed description of the beneficial uses to which said water is to be put and the place and places where the same is to be used when diverted and applied under the aforesaid notice and of the means whereby the same is to be conveyed to such place of intended use, hereby posts

and records this additional and amended notice of appropriation of water, and gives notice to all persons whatsoever that it claims and appropriates under and by virtue of such original notice as well as this amended notice 20,000 miner's inches of the waters of Gold Creek measured under a four-inch pressure for mining, milling, power and other beneficial uses, to be diverted from said creek at a point at or near the place where this notice is posted, the same being posted on the banks of Gold Creek about one mile and one-eighth ($\frac{1}{8}$) above the town of Juneau about 500 feet below the Ebner mill and about 1250 feet above the Jualpa Dam and immediately at the point where the dam of the Alaska-Juneau Gold Mining Company has been constructed and where the water is diverted under the above-mentioned location notice, signed by L. D. Mulligan.

[2323] The water so appropriated and claimed under said notice of L. D. Mulligan and hereunder is to be diverted from Gold Creek at that point, and conveyed by means of pipes, flumes, ditches and other means of conveyance, along a proposed route running above the southerly side of the Last Chance Basin and thence around Swede Hill to a point at or near Jorgensen sawmill, on the shore of Gastineau Channel, where the same is to be applied and used for the purpose of generating power and for other purposes to be used in connection with the operation of a stamp mill at or near that point, and a portion of the water so diverted and appropriated is to be used at a point on the Colorado claim near Snow Slide Gulch for the purpose of driving a compressor

plant at that point and for the purpose of generating power at that point; and these waters so used on said Colorado claim will be conveyed by a pipe, flume and ditch along the route above indicated and taken from said pipe, flume and ditch to the extent so necessary, at said last mentioned place, if used for the purpose of furnishing power at that point as above stated. The remainder of the waters carried, not used at this point at any time, to be applied in connection with the operation of the stamp mill to be built near the Jorgenson saw mill as above stated.

NOTICE IS EXPRESSLY GIVEN, that the undersigned has not abandoned or waived any of the rights acquired under and by virtue of the notice of said L. D. Mulligan or by virtue of any of the work that it has heretofore performed looking towards the diversion and appropriation of the waters of Gold Creek or any other right or rights whatsoever it has at this present time to the waters of said creek.

Posted on the ground this 8th day of May, 1911.

ALASKA-JUNEAU GOLD MINING COMPANY.

By ROBT. A. KINZIE,

Agent and General Superintendent.

That the above-amended notice of location was on the 8th day of May, 1911, duly and regularly recorded in the office of the Recorder for the Juneau Recording District, the same being the Recording District embracing the Territory through which Gold Creek flows,

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number Eight, requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding,

Which Exception was then and there allowed by the Court. [2324]

The plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER NINE.

On the 12th day of July, 1910, the plaintiff established a survey for a ditch and flume line, which commenced at a point approximately where the Mulligan notice was posted on the following first of August, and extended thence along the hillside to the shore of Gastineau Channel where it was the intention of the plaintiff to erect a milling plant in connection with which water, diverted from Gold Creek and conveyed along the said survey line, was to be used and applied.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number Nine, requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the

case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TEN.

That on the first day of August, 1910, the plaintiff actively commenced work, looking toward the diversion, appropriation and application to use the waters of Gold Creek, with a view of diverting said waters at a point near the point where the notice posted by the said L. D. Mulligan was posted on said first day of August, and conveying the same along the mountain side to a point on the Colorado Lode Claim, where the same was to be applied in connection with the generation of power and other mining purposes, and also conveying the same to a point on the shore of [2325] Gastineau Channel, where the plaintiff intended to apply said waters in connection with the operation of a large milling plant; and that the plaintiff did from and after said first day of August, 1910, continue said work with due diligence and without cessation or delay.

That the work done by the plaintiff was such as was necessary to divert and appropriate the waters of Gold Creek as contemplated, and was done in a manner compatible with good engineering practices, and that in this connection the plaintiff constructed a flume grade and flume line from the point of diversion, it being the point where the Alaska-Juneau dam is now situate, in the bed of Gold Creek, im-

mediately below the lower side line of the Lotta Lode Mining Claim, thence to a point on the Colorado Lode Mining Claim and thence to another point on the plaintiff's millsite, situate on the shore of Gastineau Channel near what is locally known as the Jorgenson Sawmill, the said places to which said flume and flume line were thus constructed being the places of intended use.

That the route of the said flume line extends along the hillside from the said point of diversion for a short distance to the portal of a tunnel six hundred eighty (680) feet in length driven for use in this connection, thence through said tunnel and along the hillside above the Jualpa Basin a distance of three thousand one hundred eighty three (3,183) feet until it reaches the portal of the Alaska-Juneau number three tunnel, through which it passes for a distance of about two thousand four hundred (2,400) feet to a point on the Gastineau side of Mount Roberts from whence the flume line extends along the said Gastineau side of Mount Roberts to the plaintiff's mill sites.

That the work in this connection was carried on diligently and without cessation or delay from the time that [2326] it was started on the first day of August, 1910, until the same was fully completed at a cost of approximately seventy four thousand one hundred thirty-one (\$74,131.00) dollars.

That on October 3, 1910, the work done as above stated had been carried on to such an extent that a dam had been constructed across Gold Creek at the point of diversion, the same being the identical point

where the plaintiff's dam is now maintained, and the waters of Gold Creek, to the extent of approximately five thousand (5,000) miner's inches had been diverted from their natural channel, and that on the 17th day of November, 1910, the said work had been carried forward to a sufficient extent to enable the plaintiff to convey the water so diverted from the point of diversion aforesaid to a point on the Colorado Lode Claim, where the same was then and there applied to use in connection with the operation of a compressor there situate and used to furnish compressed air for use in connection with the plaintiff's mining operations; that said waters of Gold Creek so diverted as aforesaid were conveyed through the flume so constructed and applied to use in connection with the driving of said compressor, it being one of the beneficial uses designed, and have been so conveyed, diverted and applied at all times since, except that a portion of the water so diverted and conveyed were, during the Summer of 1913 and since that time, diverted and applied upon the plaintiff's millsite as hereinafter stated, until the waters of Gold Creek were diverted by the defendants in the manner indicated in these findings.

That in the month of July, 1913, the flume and flume line above referred to had been completed the entire distance to the plaintiff's mill site, situate on the shore of Gastineau Channel, and the waters diverted from Gold Creek [2327] as aforesaid were then, to wit, in the month of July, 1913, conveyed through said flume so constructed to and upon the plaintiff's mill site on the shore of Gastineau

Channel, where the same were then applied to use in connection with plaintiff's mining and milling operations there carried on, and where the same have been so used ever since, except at such times when diverted by the defendants, as elsewhere in these Findings indicated.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number Ten, requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER ELEVEN.

The Court further finds that at all times in these Findings mentioned, the plaintiff was and still is the owner of a large group of mining claims and mill sites, situate a short distance to the East of the City of Juneau, Territory of Alaska, which said group of mining claims and mill sites comprising what is locally known and generally referred to as "The Alaska Juneau Mine."

That a vein containing large deposits of gold bearing ore occurs on the plaintiff's group of said mining

claims, which said deposits have been mined on a small scale for more than twenty years.

That in the year 1899 a general plan was adopted [2328] by the plaintiff corporation with a view of opening up, developing and operating its said mines on a large scale, and work was then and there actively commenced to carry this plan into effect. The plan so adopted provided for the opening up of the ore bodies in the mine itself, the testing and sampling of the ores, the driving of a tunnel so driven as to connect the mine workings with a point on the Colorado Claim, the construction of a tram and railway through said tunnel, and the construction of a tram and flume line from thence to the shore of Gastineau Channel, the construction of a large milling plant at said last mentioned point, and the appropriation of the waters of Gold Creek to be diverted and applied in the manner elsewhere in these Findings indicated.

That the work so commenced in the year 1899 has ever since been carried on with the highest degree of diligence and has resulted in opening up what are believed to be among the largest deposits of gold bearing ore ever discovered, in the completion of the contemplated tunnel driven a distance of six thousand five hundred thirty-eight (6,538) feet so as to connect the workings in the plaintiff's mine with the point on the Colorado Claim above indicated, as well as the completion of four other tunnels made necessary to furnish a route for the plaintiff's tram and flume line, the construction of a tram line extending from the plaintiff's mine workings through the tun-

nel to the portal thereof and thence along the route indicated to the plaintiff's mill site, the construction of a flume and flume line and the diversion and appropriation of the waters, as elsewhere in these Findings indicated, the construction of wharves, warehouses, tramways, ore-bins, rock houses, and numerous other buildings and appliances forming a part of a milling plant, which is designed to have an ultimate [2329] capacity of twelve thousand (12,000) tons per day, in connection with the construction of which work is now being done on plaintiff's mill sites, situate on the shore of Gastineau Channel, as above indicated.

That a portion of said milling plant, containing forty (40) stamps, has been completed, and is now being used as a pilot mill.

That in addition to the tunnels and tram line, above referred to, an additional and further tunnel is being driven commencing at approximately sea level on the plaintiff's said mill site, and extending in an easterly direction to connect with the workings of the plaintiff's mines in Silver Bow Basin in order to furnish an additional route for a tram line for use in connection with the transportation of ores from the plaintiff's said mine to the plaintiff's said milling plant, and that the plaintiff has supplied itself with locomotives, cars and other necessary appliances used to convey the ores from its said mine to its said mill site.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted

to the ruling and order of the Court in refusing to find Finding Number Eleven requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TWELVE.

The Court further finds that on or about the 17th day of December, 1913, the defendants diverted all the waters [2330] flowing in Gold Creek at a point approximately three-fourths of a mile above the plaintiff's dam and intake without restoring the same to their natural channel until the same were carried a great distance below the plaintiff's said dam and intake, and did thereby prevent the waters flowing in Gold Creek from reaching the plaintiff's dam and intake; that the defendants have ever since continued to so divert said water, prevent the same from reaching the plaintiff's intake and are still continuing so to do, and intend to and will, unless restrained by an order of the Court, continue such diversion.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to

find Finding Number Twelve requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER THIRTEEN.

The Court finds that by reason of the fact that the defendants have diverted the waters of Gold Creek at a point above the plaintiff's intake, the plaintiff is wholly deprived of the use of the waters flowing in said creek.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number Thirteen requested by the plaintiff, on the ground that [2331] said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER FOURTEEN.

The Court further finds that at the time the water was diverted by the defendants, the plaintiff was applying the same, the whole and every part thereof, to use in connection with the driving of its compressor plant on the Colorado Claim as aforesaid, and in carrying on its mining and milling operations on its mill site on the shore of Gastineau Channel, and that the plaintiff then and at all times ever since has required and needed the use of said water in connection with its said operations.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number Fourteen requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER FIFTEEN.

The Court further finds that at the time of the commencement of this action, the plaintiff was, and still [2332] is, and at all times hereafter will be, in position to apply to use all the waters appro-

priated by it from Gold Creek, as in these Findings indicated, in connection with its mining and milling operations, the same being the beneficial use designed at the time the appropriation was made, and that the plaintiff will require in that connection, at all times in the future, all the water so appropriated by it as aforesaid in connection with the carrying on of its said mining and milling operations, and that the plaintiff has not now sufficient power available from other sources to carry on its said operations.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and Order of the Court in refusing to find Finding Number Fifteen requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER SIXTEEN.

The Court finds that one of the defendants, the Alaska Ebner Gold Mines Company is and was at the time of the commencement of this action insolvent.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Sixteen requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively [2333] shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER SEVENTEEN.

That the damages resulting to the plaintiff from the diversion of the water by the defendants are speculative in their nature and such that they cannot be calculated and recovered in an action at law.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Seventeen requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER EIGHTEEN.

The Court further finds that gold was first discovered in Alaska in Silver Bow Basin in the year 1880; that shortly thereafter the Harris Mining District was duly and regularly organized so as to embrace the Territory in which gold was so discovered; that Gold Creek, as well as all and singular the property rights and other things connected therewith, to which reference is made in these Findings or in the pleadings herein, are situate within the boundaries of the Harris Mining District, which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding [2334] Number Eighteen requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER NINETEEN.

That at a meeting of the miners of the Harris Mining District, previously organized, held in the year 1882, the Miners of said District duly and regularly

adopted the following rules with reference to the diversion and appropriation of water:

“Article I. The right to use the running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.

Article II. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

Article III. The person entitled to the use may change the place of diversion, if others are not injured by such change and may extend the ditch, flume, pipe or aqueducts by which the diversion is made to place beyond that where the first use was made.

Article IV. A water appropriation may be turned into the channel of another stream and mingled with its waters and then reclaimed, but in reclaiming it the water already appropriated by another must not be diminished.

Article V. As between appropriators, the one first in time is the one first in right.

Article VI. A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion stating therein:

First: He claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure.

Second: The purpose for which he claims it, and the place of intended use:

A copy of the notice must within ten (10) days after it is posted be recorded in the books kept by the recorder of the District. [2335]

Article VII. Within twenty days, during the working season, after the notice is posted, the claimant must commence the excavations or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by rain or snow.

Article VIII. By 'completion' it is meant conducting the waters to the place of intended use.

Article IX. By a compliance with the above rules, the claimant's right to the use of the water relates back to the time the notice was posted.

Article X. A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies therewith.

Article XI. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases."

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Nineteen requested by the plaintiff, on the ground that said Finding is upon a

material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TWENTY.

That all and singular the rules, elsewhere set up in these Findings as having been adopted by the miners of the Harris Mining District, have been, from the time of their adoption, generally observed by the miners of said District.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Twenty requested by the plaintiff, on the ground that [2336] said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TWENTY-
ONE.

That from and after the time that gold was first discovered in the Territory, it has been the general custom among the miners of the Harris Mining District, seeking to appropriate the waters of running streams, to post a notice at or near the point of intended diversion, stating the quantity of water claimed, measured in miners inches, the purpose for which it was claimed and the place of intended use, and to record said notice within ten (10) days after the same was posted, with the Recorder for the Recording District in which the stream, the waters of which were sought to be appropriated, was situated.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the court in refusing to find Finding Number Twenty-one requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TWENTY-
TWO.

The Court further finds that the notice posted by

H. T. Tripp, and elsewhere referred to in the Findings of the Court, was not recorded until the 25th day of October, 1910. [2337]

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there expected to the ruling and order of the Court in refusing to find Finding Number Twenty-two requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TWENTY-THREE.

The Court further finds that no work of any character was done, looking towards the diversion and appropriation of the waters of Gold Creek under or pursuant to the notice posted by H. T. Tripp, and elsewhere referred to in the Findings of the Court, until after the 6th day of August, 1910.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Twenty-three requested by the plaintiff, on the ground that said Finding is upon

a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TWENTY-FOUR.

The Court further finds that the months of July and August form part of the working season in the Harris Mining District which said Finding the Court then and there refused to make. [2338]

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Twenty-four requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TWENTY-FIVE.

The Court further finds that the Parish No. 2

Lode Claim, referred to in the Answer herein, was held by a final judgment of this court to have had no validity or existence at any time referred to in these Findings, and that said pretended lode claim was entirely void; that a judgment was rendered in the case of the Ebner Gold Mining Company against The Alaska-Juneau Gold Mining Company, the same being cause No. 835-A on the docket of this court, and in this connection the Court finds that said pretended lode claim is and at all times herein mentioned was void, fictitious and of no effect and not the property of the defendants, either, or any of them.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Twenty-five requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court. [2339]

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBERTWENTY-SIX.

The Court further finds that the plaintiff had no knowledge of the fact that the notice posted by H. T.

Tripp, during the latter part of the month of June, 1910, had been posted or that any such notice was in existence until some time after it had caused the notice, posted by L. D. Mulligan on the first day of August, 1910, to be posted and recorded and until after work had been commenced by the plaintiff looking towards the diversion and appropriation of the waters of Gold Creek, as elsewhere in these Findings set forth, and that the first time that the plaintiff had received any knowledge or information that such notice had been posted, or was in existence at all, was some time in the month of September, 1910.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Twenty-six requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TWENTY-SEVEN.

The Court further finds that the Ebner Gold Mining Company, one of the defendants, had been for a long time prior to August, in the year 1910, the

owner of a group of [2340] lode mining claims situate on the banks of Gold Creek, and that it had been engaged for some years past in working these claims on a small scale; that in this connection a twenty-stamp mill had been constructed upon the property at a point a considerable distance up stream from the lower end thereof and the waters of Gold Creek had been diverted and applied to use in connection with these operations; that a dam had been built for this purpose, as well as a flume line to convey the waters to said mill, and that the waters so diverted and applied were turned back into the natural waters of Gold Creek at a point above the intake of the plaintiff and above the point where the plaintiff caused the notice, signed by L. D. Mulligan, to be posted; that prior to the year 1910 and after the said twenty-stamp mill had been constructed and was set in operation, the said Ebner Gold Mining Company, with a view of enlarging its milling capacity, adopted plans to construct a new and enlarged mill on the Lotta lode mining claim, at a point between the said twenty-stamp mill and the point where plaintiff's intake is situate and above the intake of the plaintiff, and that in this connection the said Ebner Gold Mining Company constructed a mill building in which to install and house machinery and stamps, but did not install the machinery or stamps in said building, but did build a flume from the Ebner dam to a point above said building so as to enable it to divert the waters of Gold Creek and convey the same to said building for use therein, which said building was so situate that

if the waters of Gold Creek were diverted and applied to use in connection with the operations of a mill or other appliances at that point, the same would be turned back into the natural channel of Gold Creek a [2341] considerable distance above the plaintiff's dam and intake since constructed, and in this connection the Court finds that said building, together with the flume leading from a point above it to the Ebner dam, were actually on the ground and in position at the time this action was commenced and during the months of June and August in the year 1910.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Twenty-seven requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TWENTY-EIGHT.

The Court further finds that on the first of August, 1910, the plaintiff had no knowledge of the fact that the defendants or either or any of them in-

tended to erect a milling plant at any point further down Gold Creek than the site of the plaintiff's dam and intake, or, that the defendants or either or any of them intended to appropriate the waters of Gold Creek and convey the same to any point below the plaintiff's dam and intake.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Twenty-eight requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the [2342] evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER TWENTY-
NINE.

The Court further finds that the defendants decided to construct a milling plant in the vicinity of Shady Bend, a point below the plaintiff's dam and intake on the 6th day of August, 1910.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Twenty-nine requested by the

plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER THIRTY.

The Court finds that none of the defendants herein, except the Ebner Gold Mining Company, owned any interest in any mining claim or other real property situate in the Harris Mining District or elsewhere in the Territory of Alaska, prior to the first day of August, 1910, or for a long time thereafter.

Which said Finding the Court then and there refused to make. [2343]

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Thirty requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER THIRTY-
ONE.

The Court finds that at all times during the months of June, July and August in the year 1910, the Ebner Gold Mining Company was the owner of a group of mining claims locally known as the "Ebner Group" and also as the "Ebner Mine" property; that the most southerly claim belonging to this group and the claim farthest down Gold Creek is and was the Lotta lode claim, and that the lower or southerly side line of the said Lotta claim forms the lowermost boundary of the property belonging to the said Ebner Gold Mining Company, and that the said Ebner Gold Mining Company did not during the months of June, July or August in the year 1910 own or possess any mining claim or other right or interest in property to which the waters of Gold Creek could be conveyed lower down the creek than the said lower side line of the said Lotta claim; and that the point near Shady Bend selected on the 6th day of August as a site for a milling plant did not at that time, nor at any time during June, July or August, 1910, or for a long time thereafter, belong to the said Ebner Gold Mining Company, or any of the other defendants in this action, which said Finding the Court then and there refused to make. [2344]

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Thirty-one requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings,

and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER THIRTY-TWO.

That the notice posted by H. T. Tripp in the month of June, 1910, elsewhere referred to in these Findings, was posted at the intake of the Ebner flume, then situate upon the ground and on the right-hand side of Gold Creek going up stream, it being the side of the stream where the water entered the then existing flume.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Thirty-two requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER THIRTY-
THREE.

That the Ebner dam and the Intake of the Ebner flume, where the notice posted by H. T. Tripp, elsewhere [2345] referred to in these Findings, was posted, is situate upon one of the mining claims owned by the Ebner Gold Mining Company, and could not be reached by anyone without entering upon the property of said Ebner Gold Mining Company.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Thirty-three requested by the plaintiff, on the ground that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER THIRTY-
FOUR.

The Court further finds that while the Ebner dam is visible from certain points along the Silver Bow Basin road, the road is so far distant from said dam that anyone passing along the same could not see a notice there posted sufficiently well to determine the

character of the same, read the same or otherwise inform himself concerning the same, except that it might be seen that a piece of paper was there posted, but a paper so posted would not be visible to anyone passing along said road, except at one or two points and then for a short distance only, the distance from the point where said notice was posted to the point on said highway where the same might possibly be seen being approximately one hundred fifty feet.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Thirty-four requested by the plaintiff, on the ground [2346] that said Finding is upon a material issue of fact presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court.

Plaintiff then and there further requested the Court to find as follows:

PLAINTIFF'S FINDING NUMBER THIRTY-FIVE.

The Court further finds that the notice posted by H. T. Tripp at the intake of the Ebner flume during the month of June in the year 1910, which said notice is more definitely described and referred to elsewhere in the Findings of the Court, was torn down

during the latter part of July, in the year 1910.

Which said Finding the Court then and there refused to make.

The plaintiff, by counsel, then and there excepted to the ruling and order of the Court in refusing to find Finding Number Thirty-five requested by the plaintiff, on the ground that said Finding is upon a material issue of facts presented by the pleadings, and is based upon and supported by all the evidence in the case, and for the reason that the evidence conclusively shows the facts to be as stated in said Finding.

Which Exception was then and there allowed by the Court. [2347]

Conclusions of Law Requested by Plaintiff.

The plaintiff also requested the Court to adopt as the conclusions of the Court the following:

CONCLUSION OF LAW NO. 1.

The Court concludes from the Findings made that the plaintiff is the prior appropriator of five thousand miners inches of the waters of Gold Creek, and has as against the defendants, and each and all of them, a right to the use of five thousand miners inches of the waters of Gold Creek to be diverted at the plaintiff's present dam and conveyed to the points of use indicated in the Findings.

Which request of the plaintiff was then and there denied by the Court, to which ruling and order of the Court, the plaintiff, by counsel, then and there excepted, on the grounds, among others, that the Conclusion of Law requested followed from the facts as found by the Court and also from the facts as proven

upon the trial by the evidence adduced by the parties.

Which Exception was then and there allowed by the Court.

The plaintiff further requested the Court to adopt as a Conclusion of Law, from the evidence and the facts found, the following Conclusion:

CONCLUSION OF LAW NO. 2.

From the Findings made, the Court concludes that the defendant, The Ebner Gold Mining Company, has wrongfully and without right diverted the waters of Gold Creek at a point above the plaintiff's intake in such a manner as to wholly deprive the plaintiff of the use of the water appropriated by it, and threatens to and will continue to so divert said water and deprive the plaintiff of the use thereof unless enjoined by the Court.

Which request of the plaintiff was then and there denied by the Court, to which ruling and order of the Court, the plaintiff, by Counsel, then and there excepted, on the grounds, among [2348] others, that the Conclusion of Law requested followed from the facts as found by the Court and also from the facts as proven upon the trial by the evidence adduced by the parties.

Which Exception was then and there allowed by the Court.

The plaintiff further requested the Court to adopt as a Conclusion of Law, from the evidence and the facts found, the following Conclusion:

CONCLUSION OF LAW NO. 3.

From the Findings made, the Court concludes that

the plaintiff has no plain, speedy or adequate remedy at law, and that it can obtain no relief except in a court of equity.

Which request of the plaintiff was then and there denied by the Court, to which ruling and order of the Court, the plaintiff, by Counsel, then and there excepted, on the grounds, among others, that the Conclusion of Law requested followed from the facts as found by the Court and also from the facts as proven upon the trial by the evidence adduced by the parties.

Which Exception was then and there allowed by the Court.

The plaintiff further requested the Court to adopt as a Conclusion of Law, from the evidence and the facts found, the following Conclusion:

CONCLUSION OF LAW NO. 4.

From the Findings made, the Court concludes that the defendants should be enjoined from **interfering** with or diverting the waters of Gold Creek to the extent of five thousand miners inches, or to interfere with the flow of the first five thousand miners inches flowing in Gold Creek at the point where plaintiff's dam and intake is situate: [2349]

Which request of the plaintiff was then and there denied by the Court, to which ruling and order of the Court, the plaintiff, by Counsel, then and there excepted, on the grounds, among others, that the Conclusion of Law requested followed from the facts as found by the Court and also from the facts as proven upon the trial by the evidence adduced by the parties.

Which Exception was then and there allowed by the Court. [2350]

Findings of Fact and Conclusions of Law.

Be it further remembered that the Court thereupon made and adopted its Findings of Fact and Conclusions of Law, which are as follows:

I.

That the defendant, the Ebner Gold Mining Company, was, prior to the filing of the complaint of plaintiff herein, and at the time of the trial of said cause, and now is, a corporation, duly organized and existing under the laws of the Territory of Alaska, and as such has complied with all of the rules respecting corporations doing business in the Territory of Alaska, and has paid its license fees as provided for by Chapter 11 of the Session Laws of 1913 of the Territory of Alaska, and is authorized to sue and maintain suits, actions and proceedings in said Territory of Alaska, and that the remaining defendants are merely nominal and not necessary defendants.

II.

That the said Ebner Gold Mining Company is the principal defendant in this case, the other defendants are not necessary parties to the action, but are made defendants by reason of the facts alleged in the complaint, and they are in no wise connected with the ownership of the property hereinafter referred to, or in any wise connected with the water right in question so as to affect the determination of this case. The Ebner Gold Mining Company was for a long time prior to the commencement of this action, and was at the trial of the same, the owner of a large

number of contiguous quartz mining claims and mill sites in Silver Bow Basin near Juneau, Alaska. That these mining claims carry and contain gold in great value in the form of a low grade milling ore. That the upper end lode claims lie high up in the mountains and the mill sites in the valley below; that Gold Creek flows over and across the said group of lode claims commencing at the upper [2351] end thereof, then, in its course, winds its way down to the mill sites of said company; the said creek is a mountain stream with considerable fall and rapids, and at certain seasons of the year carries quite a large volume of water, and, at other seasons the flow of water is somewhat small by reason of cold weather. That for 15 or 20 years prior to the commencement of this action by the plaintiff, the Ebner Gold Mining Company had been mining and milling the ores taken from some of their claims at the upper end of the group and for said purpose constructed, operated and maintained part of the time a 10-stamp quartz mill and part of the time a 15-stamp quartz mill located at the upper end of the group of claims, and in connection with the quartz mill constructed and maintained ore bunkers, air-compressor and all buildings, equipment and machinery necessary for successfully operating said mill, mining and milling and treating the ores taken from said upper end lode claims. That for the purpose of power in the mining and milling of said ore, the said company diverted and appropriated and used from Gold Creek water, all the water that was necessary for the purposes above referred to. This diversion of water from

Gold Creek was also made at the upper end of the group of claims and taken off of the property of the defendant company, used for the purpose above mentioned, and returned to Gold Creek.

III.

That sometime about 1908, and a long time prior to the commencement of this action, the Ebner Gold Mining Company and its general manager and president, William M. Ebner, concluded to open up the said mining property and mine, mill and treat the ores taken therefrom upon a larger scale than it had theretofore been operating said mines, and to that end and purpose it was concluded to drive a large working tunnel, commencing said tunnel at the lower end of the property upon what is known as Cape Horn No. 2 lode claim belonging to said company, thence driving said tunnel through said group of claims to the upper end of the same to the [2352] old workings, which said tunnel would crosscut the formation and show up the values of the property, as well as to serve as a working tunnel. They also concluded upon building and constructing and equipping a large stamp-mill of about 150 or 200 stamps at or near the portal of said crosscut and working tunnel and to build and construct a flume and pipeline to take from Gold Creek a large quantity of water and convey it from a point at or near where the water had been diverted from the creek in connection with the said 15-stamp mill, which is at the upper end of the group of claims, to a point near the portal of the tunnel and at the place where it was decided to erect the 150 or 200-stamp mill, and to

erect such other buildings and install such other machinery so as to carry out the plans decided upon.

That during the year of 1909 one H. T. Tripp, an experienced mining engineer, was employed by persons interested in said group of mining claims of the Ebner Gold Mining Company to look over, examine and explore said mining property and to report on the advisability of opening up and mining said property on a larger scale, as had been decided on by the said William M. Ebner, and the said Ebner Gold mining Company. That said Tripp made a thorough examination of the property, its formation, the ore body or bodies, and the water of Gold Creek flowing there through, and reported favorably on what the said Ebner and Ebner Gold Mining Company had concluded to do. That Tripp completed his work and made his report about the last of June or the first of July, 1910.

That the plaintiff then and there objected and excepted to Finding No. III as made by the Court, on the following grounds:

That said Finding is contrary to the evidence, is not supported by sufficient evidence and does not, either in whole or in part, conform to the facts proven on the trial. Special objection is made and exception taken to said part of the Finding reading as follows: "and to that end and purpose it was concluded to drive a large working tunnel, commencing said [2353] tunnel at the lower end of the property upon what is known as Cape Horn No. 2 lode claim belonging to said company," for the reason that the evidence conclusively shows that William M. Ebner

never contemplated the driving of any such tunnel as is therein referred to, but expected to build a mill on what is known as the Lotta claim, and open up and develop the mine from that point.

Special objection is made and exception taken to that part of the language quoted, reading as follows: "Cape Horn No. 2 lode claim belonging to said company," on the ground that the evidence conclusively shows that said company had no title, right or interest to the Cape Horn #2 lode claim at the time referred to, nor at the time of the commencement of this action, or at any other time, at least not until a long time after the commencement of this action.

Special objection is made and exception taken to that part of the Finding, reading as follows: "They also concluded upon building and constructing and equipping a large stamp-mill of about 150 or 200 stamps at or near the portal of said crosscut and working tunnel and to build and construct a flume and pipe-line to take from Gold Creek a large quantity of water and convey it from a point at or near where the water had been diverted from the creek in connection with the said 15-stamp mill, which is at the upper end of the group of claims, to a point near the portal of the tunnel and at the place where it was decided to erect the 150 or 200-stamp mill, and to erect such other buildings and install such other machinery so as to carry out the plans decided upon."

Special objection is made and exception taken to the language above last quoted on the ground that the evidence conclusively shows that it was the intention of William M. Ebner to build and erect a

large milling plant on the Lotta lode mining claim, the same being a point above the plaintiff's intake, and to [2354] there use the waters diverted from Gold Creek so as to return them to Gold Creek before plaintiff's intake was reached; that neither said Ebner or any one else ever conceived the idea of building a flume and conveying the water from the point mentioned in the language last quoted to the point herein referred to, until after the 6th day of August, 1910, six days after the plaintiff's right to the waters of Gold Creek had been initiated.

Which said Finding, having been adopted by the Court over the objection of the plaintiff, the Exception of the plaintiff so taken to the making of said Finding, was then and there allowed by the Court.

IV.

The Court further finds that as early as October, 1880, the miners in and near the vicinity of Juneau and Silver Bow Basin, including the territory covered by the Ebner Company's group of mining claims, diverted and appropriated water from streams to be used for mining and other beneficial purposes and ever since about that date it has been the universal practice and general custom for any person or corporation desiring to appropriate water for the purposes last above mentioned to post a notice in writing in a conspicuous place at the intended point of diversion on the creek or stream from which the water is expected to be diverted or taken; that the posting of such notice has always been considered under such general custom of miners as the first step taken looking towards the appropriation and

applying the water to mining or some other beneficial use as well as showing the intention of the person or corporation posting the notice and giving warning and notice to others of the poster's intention of utilizing such water.

And the Court further finds that the posting of the notice in the manner above mentioned does serve the purpose above [2355] stated. That the said H. T. Tripp knew of the above mentioned custom, and while examining and exploring the group of mining claims of the said Ebner Gold Mining Company as stated in these Findings, on the 29th day of June, 1910, attached to a board and posted in a conspicuous place on the Ebner Gold Mining Company's dam, which had been constructed for the purpose of diverting the water and conducting it to the 15-stamp mill, a written notice claiming 10,000 miner's inches of water of the said Gold Creek, which said notice is as follows:

“NOTICE OF WATER.

Notice is hereby given to all whom it may concern that I the undersigned claim 10 thousand miner's inches of the water flowing in this creek or any part of 10 thousand miner's inches that may be flowing at any season of the year to be conveyed by ditch, flume or pipe along the bank of Gold Creek with pipe or flume or both to any place on the property known as the Ebner Mine or to carry across or farther than the limits of the said mine property. This location is made on the ground this day and date and is posted at the place known as the Ebner dam about 1- $\frac{3}{4}$ miles

up from Juneau, Alaska, on Gold Creek.

Dated this 20th day of June, 1910.

Time—7:30 A. M.

Locator—H. T. TRIPP.

Witness: JOHN SOINI.”

That said notice could be plainly seen from a public highway which runs up Gold Creek and in close proximity to said dam on which said notice was posted. That while said H. T. Tripp signed or affixed his own name to the notice, the said making out of said notice and posting of the same, and said step so taken looking towards the applying of said amount of water to use for mining or other beneficial purposes, was done by the said Tripp on behalf of and for the said group of mining claims of the Ebner Gold Mining Company and parties interested therein, and said water was intended to be conducted down over and across the said group of mining claims from the point of intake of the said defendant company to the mill site and tunnel portal on the Cape Horn No. 2 claim at the lower end of the Ebner property, and there to be used and applied to the air-compressor and the new mill to be built, [2356] and for mining purposes generally, as had been contemplated under the Ebner and Tripp scheme of opening up, mining and operating said property on a larger scale as had been referred to in these Findings.

That the plaintiff then and there objected and excepted to Finding No. IV as made by the Court, on the following grounds:

That the same is contrary to the evidence and not supported by sufficient evidence and does not con-

form to the facts proven on the trial. The plaintiff objects and excepts that portion of the Finding wherein it is found that the miners of the Harris Mining District posted a notice at the point of intended diversion on the creek or stream from which water was expected to be diverted or taken pursuant to a custom. Objection to this part of the Finding is based on the fact that the evidence conclusively shows that the posting of a notice in the Harris Mining District was not pursuant to a custom but pursuant to a written rule upon that subject.

Objection is further made and exception taken to that portion of the Finding No. 4 where it is held that the posting of such notice was always considered under the general custom of miners as the first step taken looking toward the appropriation and applying of water. This objection and exception is based on the ground that there is no evidence that the miners considered any custom as the first step, or that there was any custom to post notices whatsoever. The evidence conclusively shows that the posting of a notice was pursuant to a written rule, and that there is no evidence in the record as to how the miners considered this posting with reference to whether or not it was the first step or any other step.

The plaintiff especially objects and excepts to the following language contained in said last mentioned Finding, "That said notice could be plainly seen from a public highway which runs up Gold Creek and in close proximity to said dam on which said notice was posted," for the reason [2357] that the fact as shown by the evidence is that the point at

which said notice was posted, that is to say, the Ebner dam, is situated a considerable distance, to wit, many yards, from the wagon-road leading up Silver Bow Basin, and is so situate that even the dam itself can only be seen at one or two small points on the road, and the distance is so great that nowhere on the road could anyone passing there see anything more than a white paper, if such paper was posted there containing a notice, and would not be able to discern what said paper was, what writing it might contain, or what its object or purpose was.

Objection and exception is further made and taken to that portion of said Finding wherein it is found as a fact that said Tripp in posting the notice referred to in said Finding was acting for or on behalf of the said group of mining claims of the Ebner Gold Mining Company and the parties interested therein, for the reason that the evidence conclusively shows that said Tripp at that time was in the employ of F. L. Underwood and the California-Nevada Copper Company, who had no interest whatsoever in said properties, except that they had an option upon some of the stock of the Ebner Gold Mining Company; and that said Tripp was not employed by the Ebner Gold Mining Company or anyone authorized to act for or on behalf of said Company, and was never authorized or directed by said Company or any of its agents or employers to make any location of water for or on its behalf, or to take any steps whatsoever looking toward the appropriation, diversion and application to use of any of the waters of Gold Creek, or to do anything whatsoever for or on behalf

of the said Ebner Gold Mining Company, but the said Tripp was employed by the said Underwood and the said California-Nevada Copper Company for the sole purpose of making an examination of the properties for them while they had an option [2358] to purchase some of the stock of the Company, and had no other or further interest in the property and no authority whatsoever to act for or on behalf of the Ebner Gold Mining Company or anyone else interested in the properties of said company or in the Ebner mine.

Special objection is further made and exception taken to the following language occurring in said Finding, "that said water was intended to be conducted down over and across the said group of mining claims from the point of intake of the said defendant company to the mill site and tunnel portal on the Cape Horn No. 2 claim at the lower end of the Ebner property and there be used and applied to the air-compressor and the new mill to be built, and for mining purposes generally, as had been contemplated under the Ebner and Tripp scheme of opening up, mining and operating said property on a larger scale as has been referred to in these findings." Objection is made and exception to this language for the reason that the evidence conclusively shows that Tripp, the party therein named, never had in mind the construction of a mill or other appliance at the point indicated in said Finding; that the evidence conclusively shows that the said Tripp in examining the property recommended to his employers, Underwood and California-Nevada Copper Company, three

schemes in accordance with which the said mining claims might be opened up on a larger scale. One of these was to build a mill on the Lotta mining claim, the other was to build a mill at a point on the opposite side of the creek in the vicinity of where the Alaska-Juneau bunk-house was since built and the other was to build a mill at a point on the creek between the place selected and referred to in the evidence as the Mackey mill site and the Lotta claim, but Tripp never indorsed the feasibility of building a mill on what is referred to as the Mackay mill site on the Cape Horn [2359] No. 2 claim; but that no one had ever determined upon any particular mill site until the 6th day of August, 1910, when the company's directors, accompanied by a number of engineers, went upon the ground and concluded to erect a mill, not at any one of the points recommended by Mr. Tripp, but at the point on the Cape Horn No. 2 mining claim, referred to in the evidence as the Mackay mill site; that Tripp did not intend to convey the water to any one of the points recommended by him as feasible mill sites, nor to the point on the Cape Horn No. 2, referred to as the Mackay mill site, he, Tripp, not knowing what point would be selected as a future mill site.

Special objection is made and exception taken to that part of the language above quoted, reading as follows, "to the mill site and tunnel portal on the Cape Horn No. 2 claim at the lower end of the Ebner property," for the reason that the evidence conclusively shows that the lower end of the Ebner property was composed of the lower side line of the Lotta

claim at all times prior to the commencement of this suit and for a long time subsequent thereto, and that the Cape Horn No. 2 claim was at all times last mentioned the property of three parties, and that neither the Ebner Gold Mining Company nor any of the defendants in this action had or claimed any interest in said Cape Horn No. 2 claim.

Which said Finding having been adopted by the Court over the objection of the plaintiff, the Exception of the plaintiff so taken to the making of said Finding, was then and there allowed by the Court.
[2360]

V.

The Court further finds that the action of said Tripp in posting of said notice mentioned in the finding above set forth was the first step taken by anyone looking towards the future diversion and appropriation of the water of Gold Creek, and said action of said Tripp was prior to any step taken by plaintiff, or any intention made manifest by plaintiff, of taking any water from Gold Creek and applying it to mining or other beneficial use, and was prior to the posting of any water location notice by said plaintiff.

That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was posted, and after actual diversion of the water at such point, did the plaintiff do anything that would give notice to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation

of water, or indicating any intention or desire to appropriate the waters of Gold Creek.

That the plaintiff then and there objected and excepted to Finding No. V as made by the Court, on the following grounds:

That the same is contrary to the evidence, not supported by sufficient evidence, and is not in accord with the facts as proven on the trial. Objection is made and exception taken to the first paragraph of said Finding, wherein it is found that said Tripp in posting said notice took the first step taken by anyone looking towards the appropriation of the waters of Gold Creek, and the action of Tripp was prior to any step taken by plaintiff, or any intention made manifest by the plaintiff in that behalf.

This objection and exception is based, first upon the ground that the evidence conclusively shows that any step taken by Tripp would be immaterial as far as this action is concerned, because he was not in the employ of the Ebner Gold Mining Company or authorized to act for or on its behalf, and also on the ground that the evidence conclusively shows [2361] that the plaintiff had taken steps by making surveys and doing other preliminary work looking toward the diversion and appropriation *of was as* afterwards made, a long time before said notice was posted by said Tripp.

Special objection and exception is made and taken to paragraph two of Finding V, reading as follows, "That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was

posted, and after actual diversion of the water at such point, did the plaintiff do anything that would give notice to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek, excepting only the posting of the notice referred to in the complaint as the Mulligan notice." Special objection and exception is made to this paragraph above quoted in that the evidence conclusively shows that the Ebner Gold Mining Company nor any one or more of the defendants ever posted a notice on Gold Creek as indicated in said Finding, at least not until the notice posted by John R. Winn, on behalf of the Ebner Gold Mining Company, was posted late in the month of August in the year 1910. And for the further reason that the evidence conclusively shows that the plaintiff caused to be posted on the shores of Gold Creek at the point where the present Alaska-Juneau dam is situate, a notice in words and figures as follows:

KNOW ALL MEN BY THESE PRESENTS:
That, I, L. D. Mulligan, of Alaska, a citizen of the United States, and over the age of twenty-one years, have appropriated and claimed 20,000 miner's inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated by this notice posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

Dated Aug. 1st, 1910.

(Signed) L. D. MULLIGAN. [2362]

That said notice was posted by said Mulligan as the employee and agent of the plaintiff, and while said notice was signed by the said Mulligan in his own name, he did so as the agent and employee, for and on behalf of the plaintiff, and did on the 2d day of August, 1910, by a deed, convey to the plaintiff the paper title to the water located by him as above stated in order to vest in the plaintiff the legal and paper title thereto, as far as the records were concerned, which deed, together with the notice was duly and properly recorded August 8, 1910, in the office of the Recorder at Juneau, the same being the Recording District for the Territory through which Gold Creek flows and within which said notice was posted.

That on the first day of August, 1910, being the same day on which said notice was posted, the plaintiff commenced work looking towards the diversion of the waters of Gold Creek, at a point in the vicinity of said notice, and their application to the beneficial use designed, and continued work from and after said first day of August, 1910, with the highest degree of diligence and with as much speed and expedition as the conditions would admit of, employing as many men at all times as it was possible to use in that connection, until the waters were actually diverted and applied to use in the manner and at the times indicated in the complaint and a long time prior to the commencement of this action; that the work so

conducted by the plaintiff, from and after the first day of August, 1910, when the same was commenced, was carried on continuously until the water was so applied to use without cessation, without delay, and that all the work done by the plaintiff was such as to indicate to any person the fact that the same was being done for the purpose of diverting and appropriating the waters of Gold Creek in the manner that the same were afterwards diverted and appropriated.

[2363]

That in addition to this and on or about the 12th day of July, 1910, the plaintiff established a survey line commencing from the point of intended diversion, near where the Mulligan notice was posted August 1, 1910, along the hillside, along the course of the flume and ditch line intended to be constructed, to the places of intended use, to wit, a point on the Colorado lode claim and a point on the shore of Gastineau Channel in the vicinity of the Jorgensen saw mill, at which last named points the waters were afterwards applied to the beneficial use designed; that the running of said survey line, as well as any and all of the work done by the plaintiff, as above stated, was such as would give notice to anyone of the purpose of the plaintiff to divert and appropriate the water in the manner that the same was afterwards diverted and appropriated; that neither the defendant, the Ebner Gold Mining Company, nor any one of the defendants, did anything looking toward the diversion nor appropriation of the waters of Gold Creek until some time after the 6th day of August, 1910, that being after the plaintiff had already a

considerable crew employed at and in the vicinity of the proposed point of diversion, doing work necessary in connection with the diversion and appropriation of the water, as above indicated.

And further because the evidence conclusively shows that no diversion of the waters was made by the defendant, or any one of the defendants, until after the plaintiff had actually applied to use the waters diverted and appropriated by it to the extent of, at least, five thousand miner's inches.

The evidence conclusively shows that a long time prior to the diversion of the waters by the defendants, or anyone of them, as indicated in Finding V, the defendants not only could have had notice of the plaintiff's intention, because of the work done by plaintiff, but had actual notice [2364] thereof, in fact the evidence conclusively shows that they had actual notice of all of said facts a few days after the posting of said notice by the said Mulligan on August 1, 1910, which said Finding, having been adopted by the Court over the objection of the plaintiff, the Exception of the plaintiff so taken to the making of said Finding, was then and there allowed by the Court.

VII.

That by certain mesne conveyances said H. T. Tripp a long time before the commencement of this action assigned or conveyed whatever right or title he acquired by reason of posting the notice signed by him, to the defendant, Ebner Gold Mining Company.

That work was commenced under said Tripp

notice and those for whom said water was located and their successors in interest have proceeded with due diligence with their work in the opening up and developing of said mining property and the application of the water of Gold Creek under said notice to actual use. The tunnel mentioned in these findings which had been decided upon to be driven by said Tripp and Ebner was soon after the filing of said notice surveyed out, commencing at the lower end of the said group of claims on Cape Horn No. 2 lode claim, and extending to the upper end of said group of claims to what is known as the old Ebner workings, about the point of the 15-stamp mill, and had been driven at the time of the commencement of this action 2600 feet and taps the ore bodies of said group of claims at various depth, being from the bottom of said tunnel to the surface about ——— feet. That a right of way was surveyed out for a high line flume which had been decided upon by said Ebner and Tripp, said survey commencing at the point where the Tripp location notice was posted and extending around the hillside across the Ebner property to a point near the portal of the tunnel and the mill site, which said flume is 3-¾ feet by 4 feet and [2365] about 4000 feet long, and has a carrying capacity of approximately 3200 miner's inches of water, and had been completed at the time of the commencement of this action. Lumber and material were purchased for a 200-stamp mill, and most of the machinery bought to equip said mill, the mill site graded at or near the portal of said tunnel, and at or near the point where the water was to be conveyed. That on

the 14th day of September, 1910, water was diverted from Gold Creek at a point where the Tripp notice was posted, said water run through a large open cut made for the purpose of laying the new flume, and this diversion of the water from Gold Creek was prior to any diversion therefrom made by the plaintiff herein. The new flume line above referred to was completed from a point on Gold Creek where the Tripp notice was posted to the penstock of said Company on the 15th day of December, 1910. Work was commenced on the tunnel above referred to on or about the — day of —, 1910, and was diligently and actively kept up, said tunnel being 8 feet by 8 feet, and as above stated had been driven 2600 feet at the time of the commencement of this action, and at the time of filing the answer in this cause there had been over 4000 feet of tunnelling, cross cuts and drifts completed. That before the commencement of this action a large new air-compressor plant had been erected near the mouth of the tunnel and a pipe-line leading from the penstock above mentioned to the air-compressor, and in August, 1913, said pipe-line was connected up with said air-compressor and the water used for power in running the same, and said air-compressor was used in continuing the driving of the new tunnel referred to in *these* finding and has been applied to that use ever since said last mentioned date. Prior to the commencement of this action the lumber and material referred to herein for the building of the 200-stamp mill as well as the machinery for the equipment of the said mill had been purchased and forwarded to Juneau, Alaska,

and most of the same on the mill site near the place of [2366] the erection of the new mill. That since the commencement of this action and at the time of the trial of the same, work has progressed on said property with due diligence and from time to time larger quantities of water taken from Gold Creek through the said new flume and applied to use by the defendant company as necessity demanded.

That the plaintiff then and there objected and excepted to Finding No. VII, as made by the Court, on the following grounds:

That the same is contrary to the evidence, is not supported by sufficient evidence and is contrary to the facts proven on the trial. The defendant especially objects and excepts to that part of the Finding wherein it is found that by mesne conveyance H. T. Tripp, prior to the commencement of this action, assigned or conveyed whatever right or title he acquired, by reason of posting the notice referred to in the Finding, to the defendant, The Ebner Gold Mining Company. Especial objection is made and exception is taken to this part of the Finding. First, because it is immaterial. Second, the conveyances by Tripp to the Ebner Gold Mining Company was after the commencement of this action. Third, because any attempted conveyance by Tripp to the said Ebner Gold Mining Company, as referred to in the Finding under consideration, was long after the rights of the plaintiff had attached and long after it had already diverted, appropriated and applied to the beneficial use designed a quantity of water flowing in Gold Creek amounting to approximately five

thousand miner's inches.

Objection is made and exception is more especially taken to that part of the Finding reading as follows, "that work was commenced under said Tripp notice and those for whom said water was located and their successors in interest have proceeded with due diligence with their work in the opening up and developing of said mining property and the application of the water of Gold Creek under said notice to actual use." [2367] This portion of the Finding is objected to and excepted to because the evidence conclusively shows that work was not commenced looking towards the appropriation and diversion of any of the waters of Gold Creek by the defendants, or any of them, of any of their predecessors in interest, until after the 6th day of August, 1910, and that the same was not prosecuted with any degree of diligence, but that some intermittent work was done between the 6th of August and the December following; that at that time all work ceased, and that when work so ceased, the flume or ditch had not been completed to the point of intended use so that the water could be conveyed thereto, nor had the waters of the creek been diverted or any attempt made to apply the same to use, and that thereafter work was not resumed in connection with the diversion and appropriation of said water for a period of about twenty-four months, and that no work whatsoever was done on the property, either in connection with the diversion or appropriation of water or otherwise for a period of about sixteen months, and that there was an absolute lack of diligence on the part of the de-

fendants and each and all of them in this connection.

And the evidence further conclusively shows that none of the work done in this connection by any one or more of the defendants was done under the Tripp notice, but that any and all work so done was done without any reference to the Tripp notice and without any knowledge on the part of any of the parties doing the same that the Tripp notice had any existence.

Objection is further made and exception taken to that part of the Finding wherein it is found that shortly after the posting of the Trip notice work was commenced on the tunnel in said Finding referred to, for the reason that the evidence conclusively shows that nothing was done in that [2368] direction until about the 15th day of August, 1910, and that whatever was then done was not done under any plans conceived by either Tripp or Ebner, but was done in accordance with plans adopted after the 6th day of August, 1910, and for the further reason that any work in connection with said tunnels is immaterial in so far as the issues in this case are concerned.

Objection is made and exception taken to that part of the Finding reading as follows: "That a right of way was surveyed out for a high-line flume which had been decided upon by said Ebner and Tripp, said survey commencing at the point where the Tripp location notice was posted and extending around the hillside across the Ebner property to a point near the portal of the tunnel and the hill site, which said flume is about 4000 feet long and had been completed at the time of the commencement of

this action.” This part of the Finding last quoted is objected to and excepted to for the reason that the evidence conclusively shows that no right of way was ever surveyed for a high-line flume commencing at the point where the Tripp notice was posted to the point indicated in said Finding, but that the right of way that was surveyed was not surveyed along a line decided upon by Ebner or Tripp, but along a line decided upon by the Directors of the California-Nevada Copper Company after August 6, 1910, and commenced at a point on the opposite side of Gold Creek from where the Tripp notice was posted and extended along the hillside to where the Mackay mill site was, some time after the date above mentioned, selected.

That the evidence conclusively shows that the Tripp notice was posted at the intake of the old Ebner flume on the opposite side of the creek from where the intake of the new flume was placed, and that the Tripp notice was so posted as to indicate an intention to enlarge the water right that the defendant had to take the water along the old Ebner [2369] flume and convey the same to some point on the property of the company, where the same would be used and turned back into Gold Creek above the intake of the plaintiff.

Objection is made and exception taken to that part of the Finding referring to the purchase of material for a 200-stamp mill to be erected on the mill site graded at the point referred to in the Finding, for the reason that at the time of the trial of this action and a long time prior to its commencement the par-

ties then in charge of the property had abandoned any attempt to erect a mill at that point and were contemplating the erection of a mill on the shore of Gastineau Channel so that all of said Finding relating to the matters last referred to is immaterial.

Objection is made and exception taken to that part of the Finding under consideration that reads as follows: "That on the 14th day of September, 1910, water was diverted from Gold Creek at a point where the Tripp notice was posted, said water run through a large open cut made for the purpose of laying the new flume, and this diversion of the water from Gold Creek was prior to any diversion therefrom made by the plaintiff herein," for the reason that the evidence conclusively shows that no diversion of the waters of Gold Creek was made by the defendants or any one of them or any of their predecessors until a long time after the date therein named and until the plaintiff had actually diverted the waters of the creek and applied the same to the beneficial use designed.

Objection is made and exception taken to that part of the Finding under consideration, which reads as follows: "The new flume line above referred to was completed from a point on Gold Creek where the Tripp notice was posted to the penstock of said company on the 15th day of December, 1910," for the reason that the evidence conclusively shows that no flume was ever built from the point where the Tripp notice [2370] was posted except the old Ebner flume, which was already in existence at the time of the posting of said notice, and for the further rea-

son that the flume that actually was built was not completed at the time referred to in this Finding, but was completed at a time more than two years thereafter and after the plaintiff had already diverted the waters of Gold Creek at its dam and conveyed the same to the place of intended use and there applied the same to the beneficial use designed.

Objection is made and exception taken to that part of the Finding next following the portion above last quoted, relating to the driving of the tunnel therein referred to on the ground, first, that said part of the Finding is immaterial, and, second, that the work in connection with the driving of said tunnel was not carried on diligently or actively but spasmodically and periodically, and that work ceased in that connection for a period of more than one year at one time.

Which said Finding, having been adopted by the Court over the objection of the plaintiff, the Exception of the plaintiff so taken to the making of said Finding, was then and there allowed by the Court.

VIII.

The Court further finds that at the time the plaintiff in this case claims that the defendants were wrongfully depriving said plaintiff of the use of the water of Gold Creek, the defendants were using the same, and it was necessary for the defendants to have the same to progress with their said work. That it has been necessary at all times for defendant to have the use of said water. [2371]

IX.

That the tunnel being driven by the defendant, the

Ebner Gold Mining Company, referred to in these findings, is being driven through the group of Ebner lode mining claims, known as the Ebner mine, being the group of lode mining claims for the benefit of which said water was located by said Tripp, as aforesaid, and all of the work in connection with the development and opening up of the ore bodies in said group of claims since the location of said water by said Tripp has been done with diligence, and \$351,000.00, more or less, expended in opening up such ore bodies in said Ebner group of lode mining claims, and the work was at the time of the trial still progressing with diligence. That all of said work was being done for the purpose of opening up the Ebner group of lode mining claims as a mine so that the bodies of ore within the exterior boundary lines of said group of claims could be opened up and mined, and the ores milled and treated, and the precious metals extracted therefrom.

That the plaintiff then and there objected and excepted to Finding No. IX as made by the Court, on the following grounds:

That the same is contrary to the evidence, not supported by sufficient evidence and the facts therein found are not in harmony with the facts proven on the trial. Especial objection is made and exception taken to that part of the Finding above referred to, reading as follows: "That the tunnel being driven by the defendant, the Ebner Gold Mining Company, referred to in these Findings, is being driven through the group of lode mining claims for the benefit of which said water was located by said

Tripp, as aforesaid." The part of the Finding last quoted is objected and excepted to because the evidence conclusively shows that the tunnel referred to does not pass through the group of Ebner Gold Mining Company's claims known as the Ebner mine, being the group [2372] of lode mining claims for which the benefit of said water was located by said Tripp, for the reason that at the time of the said attempted location by the said Tripp and the said Tripp notice was posted, the property of the Ebner Gold Mining Company consisted of a group of lode claims, the lowermost of which was the Lotta lode mining claim, the lowermost portion of which was above the plaintiff's intake and dam, so that the waters of Gold Creek could not be used upon any part of the Ebner Gold Mining Company's property, which was known and referred to as the Ebner mine, without returning the same to Gold Creek at a point above the plaintiff's dam and intake; and further that this was the condition of affairs at the time the notice of the plaintiff was posted, August 1, 1910, and for many months thereafter, while the work of the plaintiff was progressing; that at the time above mentioned and for a long time thereafter and until after the plaintiff had completed its appropriation by applying to use the waters diverted, the Cape Horn No. 2 lode mining claim, as well as all the other property through which the said tunnel was driven, belonged to parties other than the Ebner Gold Mining Company, and the Ebner Gold Mining Company had no right, title or interest and further that

of which facts were shown by the records as the evidence shows.

The evidence conclusively shows that whatever waters were located by Tripp were intended to be used at some point above the plaintiff's intake in such a manner as to return the same to Gold Creek before the plaintiff's intake was reached.

Objection is made and exception taken to the remaining portion of said Finding on the ground that the evidence conclusively shows that the work done looking toward the development of the property as herein referred to was not done with any degree of diligence, but was done periodically and that for a period of more than one year, at least, no work whatsoever was done in that direction. [2373]

Which said Finding, having been adopted by the Court over the objection of the plaintiff, the Exception of the plaintiff so taken to the making of said Finding, was then and there allowed by the Court.

X.

With reference to the rules and regulations which plaintiff sets out in its reply and claims were adopted by the miners of Harris Mining District in 1882, covering and governing the appropriation and diversion of water from streams for mining and other beneficial uses, the Court finds, after careful consideration of the evidence and the law relating to such rules and regulations, that they never were followed by the miners and were never put in force, or, if they ever were followed or put in force, they fell ~~into~~ ^{became} obsolete before the rights of ~~the~~ ^{the} ~~plaintiff~~ ^{plaintiff} were claimed.

be initiated, and that they are inconsistent with the general laws of the United States and could not be in force since the extension of organized government to Alaska in the year of 1884, and are therefore of no effect in the determination of the issues in this case.

That the plaintiff then and there objected and excepted to Finding No. X as made by the Court, on the following grounds:

That the same is contrary to the evidence, is not supported by the evidence and is wholly contrary to the facts actually proven on the trial. **Objection** is made and exception taken to that part of Finding X, which reads as follows: "With reference to the rules which plaintiff sets out in its reply and claims were adopted by the miners of Harris Mining District in 1882, covering and governing the appropriation and diversion of water from streams for mining and other beneficial uses, the Court finds, after careful consideration of the evidence and the [2374] law relating to such rules and regulations, that they never were followed by the miners and were never put in force." The part of the Finding contained in the language above quoted is objected and excepted to on the ground that the evidence conclusively shows that in the year 1882 the miners of the Harris Mining District, which had been previously organized, duly met and adopted the rules referred to in said Finding and set up in the Plaintiff's Reply, which were then reduced to writing and from time to time published in pamphlet form and circulated among the miners. And further that

each and all of said rules, especially those relating to the posting and recording of notices, and the commencement of work and relating to the requisites of a notice of appropriation, as well as the rule relating to the relation back, were universally followed by all the miners of the Harris Mining District from the time of their adoption in 1882 until the time of the trial and at the time when the rights of the parties in this action initiated, to wit, the year 1910, said rules and each and all of them were in full force and effect and were observed universally by the miners of the Harris Mining District, and that there is no evidence whatsoever in the record to indicate that these rules were never followed by the miners of the Harris Mining District, or that there ever was a time since their adoption when they were not followed by the miners of the said Harris District.

Objection is made and exception taken to that part of the Finding under consideration reading as follows, "or, if they ever were followed or put in force, they fell into disuse and became obsolete before the rights of either of the parties to this action were claimed to be initiated." The part of the Finding included in the language last quoted is objected to and excepted to because there is no evidence whatever proving or tending to prove, or in any wise indicating, that the rules above mentioned or any of them ever fell into [2375] disuse or become obsolete before the rights of the parties to this action had been initiated, or at any other time or times whatsoever, but on the contrary that the evidence conclusively shows that each and all of said rules

were followed and observed universally by the miners of the Harris Mining District at all times from their adoption up to the time of the trial of this cause, and that always during all said times, they were regarded by the miners of the Harris District as the law of the district.

Objection is made to the balance of the Finding following the portion last quoted, and exception taken thereto on the ground that neither said rules nor any of them are in conflict with the general laws of the United States or any of such laws.

Which said Finding, having been adopted by the Court over the objection of the plaintiff, the Exception of the plaintiff so taken to the making of said Finding, was then and there allowed by the Court.

XI.

The Court further finds that the work of diversion, appropriation and application of the water from Gold Creek by the defendants herein was prosecuted to completion with reasonable diligence from the time of the inception of said right.

That the plaintiff then and there objected and excepted to Finding No. XI as made by the Court, on the following grounds:

That the Finding is not supported by the evidence, is contrary to the evidence and the facts as therein found are not in accord with the facts as proven on the trial. Special objection is made to and exception taken to the said Finding for the reason that the evidence conclusively shows that the work of [2376] diversion and appropriation and application of the waters of Gold Creek by the defendants

was not prosecuted to completion with reasonable diligence or any degree of diligence whatsoever in that for a period of more than twenty-four months, while the plaintiff's work was in progress, no work whatsoever was done by the defendants or any of them, or any of their predecessors in interest, looking towards the diversion or appropriation of the waters of Gold Creek, and that there was such a long period when no work was done as to indicate an utter abandonment of any rights that might prior thereto have been claimed by the defendants, or either one or more of them.

Which said Finding, having been adopted by the Court over the objection of the plaintiff, the Exception of the plaintiff so taken to the making of said Finding, was then and there allowed by the Court.

Whereupon the Court, having found the facts as aforesaid, it adopted its Conclusions of Law based upon the facts so found, as follows:

CONCLUSION OF LAW.

I.

That as against the plaintiff, the defendant is the owner of and entitled to the first use of 10,000 miner's inches of water, to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted.

To which action of the Court in so concluding, the plaintiff excepted on the ground

That the facts as found by the Court do not warrant said conclusion and on the further ground that the facts actually proven at the trial show that the plaintiff diverted and appropriated the waters of

Gold Creek at a point below the intake of the defendant, the Ebner Gold Mining Company, referred to in said Conclusion, long prior to the inception of any right on the [2377] part of the defendants or either or any of them, and that the plaintiff has a prior right to the use of the waters so diverted and appropriated by it to the extent of approximately five thousand miner's inches, and that any right the defendant, the Ebner Gold Mining Company, or any other defendant, may have is subsequent to and subordinate to said right of plaintiff.

Said Conclusion having been adopted by the Court over the plaintiff's objection as aforesaid, plaintiff's Exception so taken was then and there allowed by the Court.

CONCLUSION OF LAW.

II.

That whatever rights plaintiff has in the water of Gold Creek by reason of anything set forth in its complaint, is subsequent, inferior and subordinate to the rights of the defendant, as set forth in these Findings.

To which action of the Court in so concluding, the plaintiff excepted on the ground

That the same is not warranted by the facts found by the Court and that the facts proven on the trial conclusively show that the appropriation of the plaintiff was prior in point of time to that of the defendants or any of them, and that the plaintiff under its appropriation so made is entitled to five thousand miner's inches of the waters of Gold Creek, which right is prior to and has precedence over the

rights of the defendants or any of them.

Said Conclusion having been adopted by the Court over the plaintiff's objection as aforesaid, plaintiff's Exception so taken was then and there allowed by the Court. [2378]

CONCLUSION OF LAW.

III.

That the plaintiff is not entitled to the relief asked for or to any relief.

To which action of the Court in so concluding, the plaintiff excepted on the ground

That the same is not warranted by the facts found by the Court, nor by the facts proven upon the trial.

Said Conclusion having been adopted by the Court over the plaintiff's objection as aforesaid, plaintiff's Exception so taken was then and there allowed by the Court. [2379]

NOW comes the plaintiff and presents this Bill of Exceptions, and asks that same be settled, allowed and signed by the Court and made a part of the record herein, and that the Court do certify that the above and foregoing contains all the evidence adduced and proceedings had in this cause.

HELLENTHAL and HELLENTHAL,

Attorneys for the Plaintiff.

Order Settling and Allowing Bill of Exceptions.

AND now this matter coming to be heard on the motion of the plaintiff, asking that the above and foregoing be signed, settled and allowed as a bill of exceptions herein, and made a part of the record, and that the Court certify that the same contains all the

evidence adduced and proceedings had, and the Court being fully advised in the premises, now signs, settles and allows the above and foregoing, as a full, true and correct bill of exceptions herein, and orders that the same be made part of the record herein, and the Court hereby certifies that the above and foregoing bill of exceptions so signed, settled and allowed by the Court contains all the evidence adduced upon the trial of the cause entitled.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,

vs.

THE EBNER GOLD MINING COMPANY, a Corporation, THE ALASKA-EBNER GOLD MINES COMPANY, a Corporation, ANGUS MACKEY, as Receiver for the ALASKA-EBNER GOLD MINES COMPANY, and DOWNIE D. MUIR,

—same being cause No. 1074-A, in which the same is entitled and contains a full and complete record of all the proceedings had, and is in all respects a true, full, accurate and complete bill of exceptions in this cause and I hereby certify that the same was [2380] filed and presented within the time allowed therefor by the Court.

Signed in open court this 27th day of December, in the year 1915.

ROBERT W. JENNINGS,

Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jan. 17, 1916. J. W. Bell, Clerk. By ———, Deputy. [2381]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1074-A.

ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a
Corporation. THE ALASKA-EBNER
GOLD MINING COMPANY, a Corpora-
tion, ANGUS MACKAY, as Receiver for the
ALASKA-EBNER GOLD MINING COM-
PANY, and DOWNIE D. MUIR,

Defendants.

Judgment and Decree.

This cause came on for trial before the above-entitled court on the 22d day of July, A. D. 1914, plaintiff appearing by its attorneys, Hellenthal & Hellenthal, and defendants appearing by their attorneys, Winn & Burton, and the Court having heard the testimony offered and submitted by the respective parties, and the argument of respective counsel, and having taken said cause under advisement, and fully considered the proof submitted by plaintiff and defendants, and considered the law, and having made, rendered and filed in writing its Findings of Fact and Conclusions of Law, and in its Findings of Fact and Conclusions of Law found that the Ebner Gold Mining Company, a Corporation, one of the defendants herein, is the real party defendant in interest.

now, on motion of the said last-mentioned defendant, renders this its final order and decree herein:

IT IS NOW THEREFORE ORDERED, ADJUDGED and DECREED,

1. That the plaintiff herein take nothing by reason of its complaint.

2. As against the plaintiff herein, the [2382] defendant, the Ebner Gold Mining Company, is entitled to the first and paramount use of the water of Gold Creek to the extent of 10,000 miner's inches of water, if so much be in said creek, and be useful or necessary for defendant's use or uses for mining and milling purposes, or any other beneficial purpose to be taken from said creek where said defendant's dam is constructed, to wit: near the lower boundary line of and on defendant's patented lode claim known as the Golden Fleece, or to be taken from any other point on said Gold Creek on the property of the defendant company between the said last-mentioned point and plaintiff's intake.

3. In order to make this decree and final judgment more specific in its details as to the matters referred to in the pleadings and Findings of Fact herein, the map hereto attached marked exhibit "A" shows the relative location of the flume and pipelines and other points referred to in this decree and the Findings of Fact and Conclusions of Law.

4. That the defendants have and recover of and from the said plaintiff, Alaska-Juneau Gold Mining Company, their costs and disbursements herein to be taxed according to law, and let execution issue therefor.

Done in open court this 30th day of July, A. D. 1915.

The plaintiff excepts to the signing of the foregoing decree and an exception is allowed plaintiff.

The plaintiff is hereby given five months from the date of the above decree to present and file a bill of exceptions in the above-entitled cause.

ROBERT W. JENNINGS,
Judge. [2383]



*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1074-A.

ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a
Corporation, THE ALASKA-EBNER
GOLD MINES COMPANY, a Corporation,
ANGUS MACKEY, as Receiver for the
ALASKA-EBNER GOLD MINES COM-
PANY, and DOWNIE D. MUIR,

Defendants.

Petition for an Appeal.

The above-named Alaska-Juneau Gold Mining Company, a corporation, appellant herein, conceiving itself aggrieved by the judgment and decree rendered herein on the thirtieth day of July, 1915, adjudging and decreeing, among other things, that the plaintiff should take nothing by reason of its complaint and that as against the plaintiff, the defendant, the Ebner Gold Mining Company is entitled to the first and paramount use of the water of Gold Creek to the extent of ten thousand miner's inches under the conditions and circumstances in said decree and judgment mentioned, which said judgment and decree was signed and entered by the Honorable Robert W. Jennings, Judge of the above-entitled court, on the date above mentioned, and was ren-

dered in favor of The Ebner Gold Mining Company, a corporation, The Alaska-Ebner Gold Mines Company, a corporation, Angus Mackey, as Receiver for the Alaska-Ebner Gold Mines Company, and Downie D. Muir, and against the Alaska-Juneau Gold Mining Company, a corporation, does hereby appeal from said judgment [2385] and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said judgment and decree was made duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit; and that the above-named appellant does further pray that it may be allowed an appeal from said judgment and decree and from the whole and every part thereof to the said United States Circuit Court of Appeals for the Ninth Circuit as prayed for; and appellant further prays that it may be given a supersedeas herein in order that the decree complained of may not be enforced against it, until the errors herein complained of can be reviewed by the said United States Circuit Court of Appeals for the Ninth Circuit.

HELLENTHAL & HELLENTHAL,
J. A. HELLENTHAL,
S. HELLENTHAL,

Attorneys for Appellants.

And now, to wit, on the 21 day of April, 1916, it is ordered that the appeal herein be allowed as above

prayed for, and the bond on appeal is fixed at five thousand dollars.

ROBERT W. JENNINGS,
Judge.

Due service by copy of the within admitted this 25 day of April, 1916.

WINN & BURTON,
Attorneys for Appellees.

Entered Court Journal No. M., page 35.

Filed in the District Court, District of Alaska,
First Division. Apf. 26, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [2386]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1074-A.

THE ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a Cor-
poration, THE ALASKA-EBNER GOLD
MINES COMPANY, a Corporation, ANGUS
MACKEY, as Receiver for the ALASKA-
EBNER GOLD MINES COMPANY, and
DOWNIE D. MUIR,

Defendants.

*United States Circuit Court of Appeals for the
Ninth Circuit, Holden at San Francisco.*

THE ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Appellant,

vs.

THE EBNER GOLD MINING COMPANY, a Cor-
poration, THE ALASKA-EBNER GOLD
MINES COMPANY, a Corporation, ANGUS
MACKEY, as Receiver for the ALASKA-
EBNER GOLD MINES COMPANY, and
DOWNIE D. MUIR,

Appellee.

Assignment of Errors.

Comes now the Alaska-Juneau Gold Mining Com-
pany, a corporation, appellant herein, and assigns
the following errors made by the trial court as the
errors upon which the said appellant will rely for a
reversal of the decree rendered herein.

FIRST ERROR ASSIGNED.

That the District Court for the Territory of
Alaska, Division Number One, erred in refusing to
make and adopt Finding No. 1, as requested by the
appellant, which proposed [2387] *proposed* Find-
ing of Fact No. 1 is in words and figures as follows:

Plaintiff's Finding Number One.

The Court finds that the plaintiff is a corporation
duly organized and existing under and by virtue of
the laws of West Virginia and doing business in the
Territory of Alaska with its principal place of busi-

ness at Juneau; that the plaintiff has paid the license fee for the year 1913 and the annual license due January 1, 1914, and the year 1914 as provided for by Chapter Eleven (11) of the 1913 Session laws of the Territory of Alaska, and is authorized to sue in the Territory of Alaska.

SECOND ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 2, as requested by the appellant, which proposed Finding of Fact No. 2 is in words and figures as follows:

Plaintiff's Finding Number Two.

The Court finds that the defendant, Ebner Gold Mining Company, is a corporation duly organized and existing and doing business in the Territory of Alaska.

THIRD ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 3 as requested by the appellant, which proposed Finding of Fact No. 3, is in words and figures as follows:

Plaintiff's Finding Number Three.

The Court finds that the defendant, Alaska-Ebner Gold Mines Company, is a corporation duly organized and existing and doing business in the Territory of Alaska.

FOURTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt [2388] Finding No. 4, as re-

quested by the appellant, which proposed Finding No. 4 is in words and figures as follows:

Plaintiff's Finding Number Four.

The court finds that the defendant, Angus Mackey, was duly and regularly appointed, on the 29th day of June, 1912, by an Order of this Court made and entered in the case of Valdemar T. Hammer, plaintiff, vs. Alaska-Ebner Gold Mines Company, defendant, an action then pending in this Court as case No. 928-A, as receiver for the Alaska-Ebner Gold Mining Company, and did on the first day of July, 1912, take his oath of office, and in all respects duly qualify as such Receiver, and is now the duly acting and qualified Receiver for the Alaska-Ebner Gold Mines Company; and that leave of Court has been duly obtained to sue him as such Receiver.

FIFTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 5 as requested by the appellant, which proposed Finding of Fact No. 5, is in words and figures as follows:

Plaintiff's Finding Number Five.

The Court finds that Gold Creek is a natural stream of water, having its source in the mountains situate above Silver Bow Basin, a few miles easterly from the Town of Juneau, Alaska, from whence it flows through a series of basins and canyons in a westerly direction into Gastineau Channel, an arm of the Pacific Ocean, collecting the waters of various small streams and tributaries along its course.

SIXTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 6 as requested by the appellant, which proposed Finding of Fact No. 6, is in words and figures as follows:

Plaintiff's Finding Number Six.

The Court finds that the waters of Gold Creek were flowing in their natural channel at the point of diversion and appropriation, elsewhere in these Findings more particularly designated, on the first day of August, 1910; that on the said first day of August, 1910, *that on the said first day of August, [2389] 1910*, while the said waters were flowing in their natural channel, as aforesaid, one L. D. Mulligan, who was acting in that behalf as the agent and employ and representative of the plaintiff corporation, located, claimed and appropriated twenty thousand miners inches of the waters flowing in Gold Creek at the point of diversion, elsewhere in these Findings more specifically defined, said waters so appropriated to be used in connection with the mining and milling of ores from the plaintiff's mine in the manner elsewhere in these Findings more particularly described. And the Court finds that the said Mulligan did then and there, acting for and on behalf of plaintiff as aforesaid, post a notice on the right-hand bank of Gold Creek, going up stream, at a point a short distance above where the dam of the Alaska-Juneau Gold Mining Company has since been constructed and is now maintained; the same being approximately a mile easterly and up stream from the town

of Juneau and a short distance up stream from the portal of the Alaska-Juneau Gold Creek Tunnel, situate on the Colorado lode mining claim; that the said notice so posted by the said Mulligan is in words and figures as follows, to wit:

KNOW ALL MEN BY THESE PRESENTS; That I, L. D. Mulligan, of Alaska, a citizen of the United States, and over the age of twenty-one years, have appropriated and claimed 20,000 miner's inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated by this notice posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

(Signed) L. D. MULLIGAN.

Dated Aug. 1st, 1910.

That said above-described notice was on the 8th day of August, 1910, duly and regularly recorded in the office of the Recorder for the Juneau Recording District, which said Recording District embraces the territory through which Gold Creek flows.

SEVENTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 7, as requested by the appellant, which proposed Finding of Fact No. 7 is in words and figures as follows: [2390]

Plaintiff's Finding Number Seven.

The Court finds that said L. D. Mulligan affixed his own name to said notice of appropriation,

(whereas he was, in truth and in fact, acting as agent and representative of the plaintiff in that behalf); Whereupon the said L. D. Mulligan, in order to place the legal and record title, to the rights acquired by him, in the plaintiff, made, executed and delivered to the plaintiff, on the 2nd day of August, 1910, his certain deed, conveying and quitclaiming to the plaintiff all his right, title and interest in and to the rights acquired under and by virtue of the steps taken by him as aforesaid.

EIGHTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 8, as requested by the appellant, which proposed Finding of Fact No. 8, is in words and figures as follows:

Plaintiff's Finding Number Eight.

The Court further finds that on the 8th day of May, 1911, the plaintiff posted an amended notice of appropriation at or near the point of diversion in these findings more particularly described, which said amended notice of appropriation is in words and figures as follows, to wit:

NOTICE IS HEREBY GIVEN, that, whereas, the Alaska Juneau Gold Mining Company did, by its agent, L. D. Mulligan, posting a notice claiming and appropriating 20,000 inches of water from the waters *flowing Gold Creek*, which notice is in words and figures as follows:

“KNOW ALL MEN BY THESE PRESENTS: That I, L. D. Mulligan of Alaska, a citizen of the United States and over the age of twenty one years,

have appropriated and claimed 20,000 miners inches, of the water of Gold Creek, near Juneau, Alaska, to be used for Mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated in this notice, posted on a tree and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

L. D. MULLIGAN.

Dated Aug. 1st, 1910.

And, whereas, the said L. D. Mulligan acted as the agent of the undersigned in this connection, who is now the owner and holder of said right so located by said Mulligan by virtue of such agency and by virtue of conveyances from said Mulligan; [2391]

Now, therefore, the undersigned, not waiving any of its rights or abandoning any of the rights belonging to it under and by virtue of said above described notice and the work of diverting the water of Gold Creek appropriated by reason thereof, and done pursuant thereto, but for the purpose of giving a more accurate and detailed description of the beneficial uses to which said water is to be put and the place and places where the same is to be used when diverted and applied under the aforesaid notice and of the means whereby the same is to be conveyed to such place of intended use, hereby posts and records this additional and amended notice of appropriation of water, and gives notice to all persons whatsoever that it claims and appropriates under and by virtue of such original notice as well as this amended notice 20,000 miner's inches of the waters of Gold

Creek measured under a four-inch pressure for mining, milling, power and other beneficial uses, to be diverted from said creek at a point at or near the place where this notice is posted, the same being posted on the banks of Gold Creek about one mile and one-eighth ($\frac{1}{8}$) above the town of Juneau about 500 feet below the Ebner mill and about 1250 feet above the Jualpa Dam and immediately at the point where the dam of the Alaska-Juneau Gold Mining Company has been constructed and where the water is diverted under the above mentioned location notice, signed by L. D. Mulligan. The water so appropriated and claimed under said notice of L. D. Mulligan and hereunder is to be diverted from Gold Creek at that point, and conveyed by means of pipes, flumes, ditches and other means of conveyance, along a proposed route running above the southerly side of the Last Chance Basin and thence around Swede Hill to a point at or near Jorgensen sawmill, on the shore of Gastineau Channel, where the same is to be applied and used for the purpose of generating power and for other purposes to be used in connection with the operation of a stamp mill at or near that point, and a portion of the water so diverted and appropriated is to be used at a point on the Colorado claim near Snow Slide Gulch for the purpose of driving a compressor plant at that point and for the purpose of generating power at that point; and these waters so used on said Colorado claim will be conveyed by a pipe, flume and ditch along the route above indicated and taken from said pipe, flume and ditch to the extent so necessary, at said last men-

tioned place, if used for the purpose of furnishing power at that point as above stated. The remainder of the waters carried, not used at this point at any time, to be applied in connection with the operation of the stamp mill to be built near the Jorgenson saw mill as above stated.

NOTICE IS EXPRESSLY GIVEN, that the undersigned has not abandoned or waived any of the rights acquired under and by virtue of the notice of said L. D. Mulligan or by virtue of any of the work that [2392] it has heretofore performed looking towards the diversion and appropriation of the waters of Gold Creek or any other right or rights whatsoever it has at this present time to the waters of said creek.

Posted on the ground this 8th day of May, 1911.

ALASKA-JUNEAU GOLD MINING COMPANY,

By ROBT. A. KINZIE,

Agent and General Superintendent.

That the above amended notice of location was on the 8th day of May, 1911, duly and regularly recorded in the office of the Recorder for the Juneau Recording District, the same being the Recording District embracing the Territory through which Gold Creek flows.

NINTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 9, as requested by the appellant, which proposed Finding of Fact No. 9 is in words and figures as follows:

Plaintiff's Finding Number Nine.

On the 12th day of July, 1910, the plaintiff established a survey for a ditch and flume line, which commenced at a point approximately where the Mulligan notice was posted on the following first of August, and extended thence along the hillside to the shore of Gastineau Channel where it was the intention of the plaintiff to erect a milling plant in connection with which water, diverted from Gold Creek and conveyed along the said survey line, was to be used and applied.

TENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 10, as requested by the appellant, which proposed Finding of Fact No. 10, is in words and figures as follows:

Plaintiff's Finding Number Ten.

That on the first day of August, 1910, the plaintiff actively commenced work, looking toward the diversion, appropriation and application to use of the waters of Gold Creek, with a view of diverting said waters at a point near [2393] the point where the notice posted by the said L. D. Mulligan was posted on said first day of August, and conveying the same along the mountainside to a point on the Colorado Lode Claim, where the same was to be applied in connection with the generation of power and other mining purposes, and also conveying the same to a point on the shore of Gastineau Channel, where the plaintiff intended to apply said waters in connection with the operation of a large milling plant; and that

the plaintiff did from and after said first day of August, 1910, continue said work with due diligence and without cessation or delay.

That the work done by the plaintiff was such as was necessary to divert and appropriate the waters of Gold Creek as contemplated, and was done in a manner compatible with good engineering practices, and that in this connection the plaintiff constructed a flume grade and flume line from the point of diversion, it being the point where the Alaska-Juneau dam is now situate, in the bed of Gold Creek, immediately below the lower side line of the Lotta lode Mining Claim, thence to a point on the Colorado Lode Mining Claim and thence to another point on the plaintiff's mill site, situate on the shore of Gastineau Channel near what is locally known as the Jorgenson Saw mill, the said places to which said flume and flume line were thus constructed being the places of intended use.

That the route of said flume line extends along the hill site from the said point of diversion for a short distance to the portal of a tunnel six hundred eighty (680) feet in length driven for use in this connection, thence through said tunnel and along the hillside above the Jualpa Basin a distance of three thousand one hundred eighty three (3,183) feet until it reaches the portal of the Alaska-Juneau number three tunnel, through which it passes for a distance of about two thousand four hundred (2,400) feet to a point on the Gastineau side of Mount Roberts from whence the flume line extends along the said Gastineau side of Mount Roberts to the plaintiff's mill sites.

That the work in this connection was carried on diilgently and without cessation or delay from the time that it was started on the first day of August, 1910, until the same was fully completed at a cost of approximately seventy four thousand one hundred thirty-one (\$74,131.00) dollars.

That on October 3, 1910, the work done as above stated had been carried on to such an extent that a dam had been constructed across Gold Creek at the point of diversion, the same being the identical point where the plaintiff's dam is now maintained, and the waters of Gold Creek, to the extent of approximately five thousand (5,000) miner's inches had been diverted from their natural channel, and that on the 17th day of November, 1910, the said work had been carried on forward to a sufficient extent to enable the plaintiff [2394] to convey the water so diverted from the point of diversion aforesaid to a point on the Colorado Lode Claim, where the same was then and there applied to use in connection with the operation of a compressor there situate and used to furnish compressed air for use in connection with the plaintiff's mining operations; that said waters of Gold Creek so diverted as aforesaid were conveyed through the flume so constructed and applied to use in connection with the driving of said compressor, it being one of the beneficial uses designed, and have been so conveyed, diverted and applied at all times since, except that a portion of the water so diverted and conveyed were, during the Summer of 1913 and since that time, diverted and applied upon the plaintiff's mill site as hereinafter stated, until the waters

of Gold Creek were diverted by the defendants in the manner indicated in these findings.

That in the month of July, 1913, the flume and flume line above referred to had been completed the entire distance to the plaintiff's mill site, situate on the shore of Gastineau Channel, and the waters diverted from Gold Creek as aforesaid were then, to wit in the month of July, 1913, conveyed through said flume so constructed to and upon the plaintiff's mill site on the shore of Gastineau Channel, where the same were then applied to use in connection with plaintiff's mining and milling operations there carried on, and where the same have been so used ever since, except at such times when diverted by the defendants, as elsewhere in these Findings indicated.

ELEVENTH ERROR ASSIGNED.

The district Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 11, as requested by the appellant, which proposed Finding of Fact No. 11 is in words and figures as follows:

Plaintiff's Finding Number Eleven.

The court further finds that at all times in these Findings mentioned, the plaintiff was and still is the owner of a large group of mining claims and mill sites, situate a short distance to the East of the City of Juneau, Territory of Alaska, which said group of mining claims and mill sites comprising what is locally known and generally referred to as "The Alaska-Juneau Mine."

That a vein containing large deposits of gold bearing ore occurs on the plaintiff's group of said mining

claims, which said deposits have been mined on a small scale for more than twenty years; [2395]

That in the year 1899 a general plan was adopted by the plaintiff corporation with a view of opening up, developing and operating its said mines on a large scale, and work was then and there actively commenced to carry this plan into effect. The plan so adopted provided for the opening up of the ore bodies in the mine itself, the testing and sampling of the ores, the driving of a tunnel so driven as to connect the mine workings with a point on the Colorado Claim, the construction of a tram and rail way through said tunnel, and the construction of a tram and flume line from thence to the shore of Gastineau Channel, the construction of a large milling plant at said last mentioned point, and the appropriation of the waters of Gold Creek to be diverted and applied in the manner elsewhere in these Findings indicated.

That the work so commenced in the year 1899 has ever since been carried on with the highest degree of diligence and has resulted in opening up what are believed to be among the largest deposits of gold bearing ore ever discovered, in the completion of the contemplated tunnel driven a distance of six thousand five hundred thirty eight (6,538) feet so as to connect the workings in the plaintiff's mine with the point on the Colorado Claim above indicated, as well as the completion of four other tunnels made necessary to furnish a route for the plaintiff's tram and flume line, the construction of a tram line extending from the plaintiff's mine workings through the tunnel to the portal thereof and thence along the route

indicated to the plaintiff's mill site, the construction of a flume and flume line and the diversion and appropriation of the waters, as elsewhere in these Findings indicated, the construction of wharves, warehouses, tramways, ore-bins, rock houses and numerous other buildings and appliances forming a part of a milling plant, which is designed to have an ultimate capacity of twelve thousand (12,000) tons per day, in connection with the construction of which work is now being done on plaintiff's mill sites, situate on the shore of Gastinau Channel, as above indicated.

That a portion of said milling plant, containing forty (40) stamps, has been completed, and is now being used as a pilot mill.

That in addition to the tunnels and tram line, above referred to, an additional and further tunnel is being driven commencing at approximately sea level on the plaintiff's said mill site, and extending in an Easterly direction to connect with the workings of the plaintiff's mines in Silver Bow Basin in order to furnish an additional route for a tram line for use in connection with the transportation of ores from the plaintiff's said mine to the plaintiff's said milling plant, and that the plaintiff has supplied itself with locomotives, cars and other necessary appliances used to convey the ores from its said mine to its said millsite. [2396]

TWELFTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 12, as requested by the appellant,

which proposed Finding of Fact No. 12, is in words and figures as follows:

Plaintiff's Finding Number Twelve.

The Court further finds that on or about the 17th day of December, 1913, the defendants diverted all the waters flowing in Gold Creek at a point approximately three-fourths of a mile above the plaintiff's dam and intake without restoring the same to their natural channel until the same were carried a great distance below the plaintiff's said dam and intake, and did thereby prevent the waters flowing in Gold Creek from reaching the plaintiff's dam and intake; that the defendants have ever since continued to so divert said water, prevent the same from reaching the plaintiff's intake and are still continuing so to do, and intend to and will, unless restrained by an order of the Court, continue such diversion.

THIRTEENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 13, as requested by the appellant, which proposed Finding of Fact No. 13 is in words and figures as follows:

Plaintiff's Finding Number Thirteen.

The Court finds that by reason of the fact that the defendants have diverted the waters of Gold Creek at a point above the plaintiff's intake, the plaintiff is wholly deprived of the use of the waters flowing in said creek.

FOURTEENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and

adopt Finding No. 14, as requested by the appellant, which proposed Finding of Fact No. 14 is in words and figures as follows: [2397]

Plaintiff's Finding Number Fourteen.

The Court further finds that at the time the water was diverted by the defendants, the plaintiff was applying the same, the whole and every part thereof, to use in connection with the driving of its compressor plant on the Colorado Claim as aforesaid, and in carrying on its mining and milling operations on its mill site on the shore of Gastinau Channel, and that the plaintiff then and at all times ever since has required and needed the use of said water in connection with its said operations.

FIFTEENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 15, as requested by the appellant, which proposed Finding of Fact No. 15 is in words and figures as follows:

Plaintiff's Finding Number Fifteen.

The Court further finds that at the time of the commencement of this action, the plaintiff was, and still is, and at all times hereafter will be, in position to apply to use all the waters appropriated by it from Gold Creek, as in these Findings indicated, in connection with its mining and milling operations, the same being the beneficial use designed at the time the appropriation was made, and that the plaintiff will require in that connection, at all times in the future, all the water so appropriated by it as aforesaid in connection with the carrying on of its said

mining and milling operations, and that the plaintiff has not now sufficient power available from other sources to carry on its said operations.

SIXTEENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing and failing to make and adopt Finding No. 16, as requested by the appellant, which proposed Finding of Fact No. 16 is in words and figures as follows:

Plaintiff's Finding Number Sixteen.

The Court finds that one of the defendants, the Alaska Ebner Gold Mines Company is and was at the time of the commencement of this action insolvent. [2398]

SEVENTEENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 17, as requested by the appellant, which proposed Finding of Fact No. 17 is in words and figures as follows:

Plaintiff's Finding Number Seventeen.

That the damages resulting to the plaintiff from the diversion of the water by the defendants are speculative in their nature and such that they cannot be calculated and recovered in an action at law.

EIGHTEENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 18, as requested by the appellant, which proposed Finding of Fact No. 18 is in words and figures as follows:

Plaintiff's Finding Number Eighteen.

The Court further finds that Gold was first discovered in Alaska in Silver Bow Basin in the year 1880; that shortly thereafter the Harris Mining District was duly and regularly organized so as to embrace the Territory in which gold was so discovered; that Gold Creek, as well as all and singular the property rights and other things connected therewith, to which reference is made in these Findings or in the pleadings herein, are situate within the boundaries of the Harris Mining District,

NINETEENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 19, as requested by the appellant, which proposed Finding of Fact No. 19 is in words and figures as follows: [2399]

Plaintiff's Finding Number Nineteen.

That at a meeting of the miners of the Harris Mining District, previously organized, held in the year 1882, the Miners of said District duly and regularly adopted the following rules with reference to the diversion and appropriation of water:

“Article I. The right to use the running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.

Article II. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

Article III. The person entitled to the use may change the place of diversion, if others are not in-

jured by such change and may extend the ditch, flume, pipe or aqueducts by which the diversion is made to place beyond that where the first use was made.

Article IV. A water appropriation may be turned into the channel of another stream and mingled with its waters and then reclaimed, but in reclaiming it the water already appropriated by another must not be diminished.

Article V. As between appropriators, the one first in time is the one first in right.

Article VI. A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion stating therein;

First: He claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure.

Second: The purpose for which he claims it, and the place of intended use.

A copy of the notice must within ten (10) days after it is posted be recorded in the books kept by the recorder of the District.

Article VII. Within twenty days, during the working season, after the notice is posted, the claimant must commence the excavations or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by rain or snow.

Article VIII. By 'completion' it is meant conducting the waters to the place of intended use.

Article IX. By a compliance with the above rules, the claimant's right to the use of the water relates back to the time the notice was posted. [2400]

Article X. A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies therewith.

Article XI. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases."

TWENTIETH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing and failing to make and adopt Finding No. 20, as requested by the appellant, which proposed Finding of Fact No. 20 is in words and figures as follows, to wit:

Plaintiff's Finding Number Twenty.

That all and singular the rules, elsewhere set up in these Findings as having been adopted by the miners of the Harris Mining District, have been, from the time of their adoption, generally observed by the miners of said District.

TWENTY-FIRST ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 21, as requested by the appellant, which proposed Finding of Fact No. 21 is in words

and figures as follows, to wit:

Plaintiff's Finding Number Twenty-one.

That from and after the time that gold was first discovered in the Territory, it has been the general custom among the miners of the Harris Mining District, seeking to appropriate the waters of running streams, to post a notice at or near the point of intended diversion, stating the quantity of water claimed, measured in miners inches, the purpose for which it was claimed and the place of intended [2401] use, and to record said notice within ten (10) days after the same was posted, with the Recorder for the Recording District in which the stream, the waters of which were sought to be appropriated, was situated.

TWENTY-SECOND ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 22, as requested by the appellant, which proposed Finding of Fact No. 22 is in words and figures as follows:

Plaintiff's Finding Number Twenty-two.

The Court further finds that the notice posted by H. T. Tripp, and elsewhere referred to in the Findings of the Court, was not recorded until the 25th day of October, 1910.

TWENTY-THIRD ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 23, as requested by the appellant,

which proposed Finding of Fact No. 23 is in words and figures as follows:

Plaintiff's Finding Number Twenty-three

The Court further finds that no work of any character was done, looking towards the diversion and appropriation of the waters of Gold Creek under or pursuant to the notice posted by H. T. Tripp, and elsewhere referred to in the Findings of the Court, until after the 6th day of August, 1910.

TWENTY-FOURTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 24, as requested by the appellant, which proposed Finding of Fact No. 24 is in words and figures as follows: [2402]

The Court further finds that the months of July and August form part of the working season in the Harris Mining District.

TWENTY-FIFTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 25, as requested by the appellant, which proposed Finding of Fact No. 25 is in words and figures as follows:

The Court further finds that the Parish No. 2 lode claim, referred to in the Answer herein, was held by a final judgment of this court to have had no validity or existence at any time referred to in these Findings, and that said pretended lode claim was entirely void; that a judgment was rendered in the case of the Ebner Gold Mining Company against

The Alaska-Juneau Gold Mining Company, the same being cause No. 835-A on the docket of this Court, and in this connection the Court finds that said pretended lode claim is and at all times herein mentioned was void, fictitious and of no effect and not the property of the defendants, either, or any of them.

TWENTY-SIXTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 26, as requested by the appellant, which proposed Finding of Fact No. 26 is in words and figures as follows:

Plaintiff's Finding Number Twenty-six.

The Court further finds that the plaintiff had no knowledge of the fact that the notice posted by H. T. Tripp, during the latter part of the month of June, 1910, had been posted or that any such notice was in existence until some time after it had caused the notice, posted by L. D. Mulligan on the first day of August, 1910, to be posted and recorded and until after work had been commenced by the plaintiff looking towards the diversion and appropriation of the waters of Gold Creek, as elsewhere in these Findings set forth, and that the first time that the plaintiff had received any knowledge or information that such notice had been posted, or was in existence at all, was some time in the month of September, 1910.

[2403]

TWENTY-SEVENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and

adopt Finding No. 27, as requested by the appellant, which proposed Finding of Fact No. 27 is in words and figures as follows:

Plaintiff's Finding Number Twenty-seven.

The Court further finds that the Ebner Gold Mining Company, one of the defendants, had been for a long time prior to August in the year 1910, the owner of a group of lode mining claims situate on the banks of Gold Creek, and that it had been engaged for some years past in working these claims on a small scale; that in this connection a twenty stamp-mill had been constructed upon the property at a point a considerable distance up stream from the lower end thereof and the waters of Gold Creek had been diverted and applied to use in connection with these operations; that a dam had been built for this purpose, as well as a flume line to convey the waters to said mill, and that the waters so diverted and applied were turned back into the natural waters of Gold Creek at a point above the intake of the plaintiff and above the point where the plaintiff caused the notice, signed by L. D. Mulligan, to be posted; that prior to the year 1910 and after the said twenty stamp-mill had been constructed and was set in operation, the said Ebner Gold Mining Company, with a view of enlarging its milling capacity, adopted plans to construct a new and enlarged mill on the Lotta lode mining claim, at a point between the said twenty stamp-mill and the point where plaintiff's intake is situate and above the intake of the plaintiff, and that in this connection the said Ebner Gold Mining Company constructed a mill

building in which to install and house machinery and stamps, but did not install the machinery or stamps in said building, but did build a flume from the Ebner dam to a point above said building so as to enable it to divert the waters of Gold Creek and convey the same to said building for use therein, which said building was so situate that if the waters of Gold Creek were diverted and applied to use in connection with the operations of a mill or other appliances at that point, the same would be turned back into the natural channel of Gold Creek a considerable distance above the plaintiff's dam and intake since constructed, and in this connection the Court finds that said building, together with the flume leading from a point above it to the Ebner dam, were actually on the ground and in position at the time this action was commenced and during the months of June and August in the year 1910. [2404]

TWENTY-EIGHTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 28, as requested by the appellant, which proposed Finding of Fact No. 28 is in words and figures as follows:

The Court further finds that on the first of August, 1910, the plaintiff had no knowledge of the fact that the defendants or either or any of them intended to erect a milling plant at any point further down Gold Creek than the site of the plaintiff's dam and intake, or, that the defendants or either or any of them intended to appropriate the waters of Gold Creek and

convey the same to any point below the plaintiff's dam and intake.

TWENTY-NINTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 29, as requested by the appellant, which proposed Finding of Fact No. 29, is in words and figures as follows:

Plaintiff's Finding Number Twenty-nine.

The Court further finds that the defendants decided to construct a milling plant in the vicinity of Shady Bend, a point below the plaintiff's dam and intake on the 6th day of August, 1910.

THIRTIETH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 30, as requested by the appellant, which proposed Finding of Fact No. 30 is in words and figures as follows:

Plaintiff's Finding Number Thirty.

The Court finds that none of the defendants herein, except the Ebner Gold Mining Company, owned any interest in any mining claim or other real property situate in the Harris Mining District or elsewhere in the Territory of Alaska, prior to the first day of August, 1910, or for a long time thereafter. [2405]

THIRTY-FIRST ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 31, as requested by the appellant, which proposed Finding of Fact No. 31 is in words and figures as follows:

Plaintiff's Finding Number Thirty-one.

The Court finds that at all times during the months of June, July and August in the year 1910, the Ebner Gold Mining Company was the owner of a group of mining claims locally known as the "Ebner Group" and also as the "Ebner Mine" property; that the most southerly claim belonging to this group and the claim farthest down Gold Creek is and was the Lotta lode claim, and that the lower or southerly side line of the said Lotta claim forms the lowermost boundary of the property belonging to the said Ebner Gold Mining Company, and that the said Ebner Gold Mining Company did not during the months of June, July or August in the year 1910 own or possess any mining claim or other right or interest in property to which the waters of Gold Creek could be conveyed lower down the creek than the said lower side line of the said Lotta claim; and that the point near Shady Bend selected on the 6th day of August as a site for a milling plant did not at that time, nor at any time during June, July or August, 1910, or for a long time thereafter, belong to the said Ebner Gold Mining Company, or any of the other defendants in this action.

THIRTY-SECOND ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 32, as requested by the appellant, which proposed Finding of Fact No. 32 is in words and figures as follows:

Plaintiff's Finding Number Thirty-two.

That the notice posted by H. T. Tripp in the month

of June, 1910, elsewhere referred to in these Findings, was posted at the intake of the Ebner flume, then situate upon the ground and on the right-hand side of Gold Creek going up stream, it being the side of the stream where the water entered the then existing flume. [2406]

THIRTY-THIRD ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 33, as requested by the appellant, which proposed Finding of Fact No. 33 is in words and figures as follows:

Plaintiff's Finding Number Thirty-three.

That the Ebner Dam and the Intake of the Ebner flume, where the notice posted by H. T. Tripp, elsewhere referred to in these Findings, was posted, is situate upon one of the mining claims owned by the Ebner Gold Mining Company, and could not be reached by anyone without entering upon the property of said Ebner Gold Mining Company.

THIRTY-FOURTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 34, as requested by the appellant, which proposed Finding of Fact No. 34 is in words and figures as follows:

Plaintiff's Finding Number Thirty-four.

The Court further finds that while the Ebner dam is visible from certain points along the Silver Bow Basin road, the road is so far distant from said dam that anyone passing along the same could not see a notice there posted sufficiently well to determine the

character of the same, read the same or otherwise inform himself concerning the same, except that it might be seen that a piece of paper was there posted, but a paper so posted would not be visible to anyone passing along said road, except at one or two points and then for a short distance only, the distance from the point where said notice was posted to the point on said highway where the same might possibly be seen being approximately one hundred fifty feet.

THIRTY-FIFTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding No. 35, as requested by the appellant, which proposed Finding of Fact No. 35 is in words and figures as follows: [2407]

Plaintiff's Finding Number Thirty-five.

The Court further finds that the notice posted by H. T. Tripp at the intake of the Ebner flume during the month of June in the year 1910, which said notice is more definitely described and referred to elsewhere in the Findings of the Court, was torn down during the latter part of July in the year 1910.

THIRTY-SIXTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing and failing to adopt as Conclusion of Law the proposed Conclusion of Law No. 1 requested by the appellant, which said Conclusion of Law No. 1 so requested by appellant is in words and figures as follows:

Plaintiff's Conclusion of Law No. 1.

The Court concludes from the Findings made that the plaintiff is the prior appropriator of five thou-

sand miners inches of the waters of Gold Creek, and has as against the defendants, and each and all of them, a right to the use of five thousand miners inches of the waters of Gold Creek to be diverted at the plaintiff's present dam and conveyed to the points of use indicated in the Findings.

THIRTY-SEVENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing and failing to adopt as Conclusion of Law the proposed Conclusion of Law No. 2 requested by the appellant, which said Conclusion of Law No. 2 so requested by appellant is in words and figures as follows:

Plaintiff's Conclusion of Law No. 2.

From the Findings made, the Court concludes that the defendant, The Ebner Gold Mining Company, has wrongfully and without right diverted the waters of Gold Creek at a point above the plaintiff's intake in such a manner as to wholly deprive the plaintiff of the use of the water appropriated by it, and threatens to and will continue to so divert said water and deprive the plaintiff of the use thereof unless enjoined by the Court. [2408]

THIRTY-EIGHTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing and failing to adopt as Conclusion of Law the proposed Conclusion of Law No. 3 requested by the appellant, which said Conclusion of Law No. 3 so requested by appellant is in words and figures as follows:

Plaintiff's Conclusion of Law No. 3.

From the Findings made, the Court concludes that

the plaintiff has no plain, speedy or adequate remedy at law, and that it can obtain no relief except in a court of equity.

THIRTY-NINTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing and failing to adopt as Conclusion of Law the proposed Conclusion of Law No. 4 requested by the appellant, which said Conclusion of Law No. 4 so requested by appellant is in words and figures as follows:

Plaintiff's Conclusion of Law No. 4.

From the Findings made, the Court concludes that the defendants should be enjoined from interfering with or diverting the waters of Gold Creek to the extent of five thousand miners inches, or to interfere with the flow of the first five thousand miners inches flowing in Gold Creek at the point where plaintiff's dam and intake is situate.

FORTIETH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting Finding of Fact No. 3 as made and adopted by the court, which is in words and figures as follows, to wit:

That some time about 1908, and a long time prior to the commencement of this action, the Ebner Gold Mining Company and its general manager and president, William M. Ebner, concluded to open up the said mining property and mine, mill and treat the ores taken therefrom upon a larger scale [2409] than it had theretofore been operating said mines, and to that end and purpose it was concluded to drive

a large working tunnel, commencing said tunnel at the lower end of the property upon what is known as Cape Horn No. 2 lode claim belonging to said company, thence driving said tunnel through said group of claims to the upper end of the same to the old workings, which said tunnel would cross out the formation and show up the values of the property, as well as to serve as a working tunnel. They also concluded upon building and constructing and equipping a large stamp-mill of about 150 or 200 stamps at or near the portal of said crosscut and working tunnel and to build and construct a flume and pipeline to take from Gold Creek a large quantity of water and convey it from a point at or near where the water had been diverted from the creek in connection with the said 15-stamp mill, which is at the upper end of the group of claims, to a point near the portal of the tunnel and at the place where it was decided to erect the 150 or 200-stamp mill, and to erect such other buildings and install such other machinery so as to carry out the plans decided upon.

That during the year of 1909, one H. T. Tripp, an experienced mining engineer, was employed by persons interested in said group of mining claims of the Ebner Gold Mining Company to look over, examine and explore said mining property and to report on the advisability of opening up and mining said property on a larger scale, as had been decided on by the said William M. Ebner and the said Ebner Gold Mining Company. That said Tripp made a thorough examination of the property, its formation, the ore body or bodies, and the water of Gold Creek flowing

there through, and reported favorably on what the said Ebner and Ebner Gold Mining Company had concluded to do. That Tripp completed his work and made his report about the last of June or the first of July, 1910.

FORTY-FIRST ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 3 reading as follows:

“And to that end and purpose it was concluded to drive a large working tunnel, commencing said tunnel at the lower end of the property upon what is known as Cape Horn No. 2 lode claim belonging to said company.”

FORTY-SECOND ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its [2410] Finding of Fact that portion of Finding of Fact No. 3 reading as follows:

“Cape Horn No. 2 lode claim belonging to said company.”

FORTY-THIRD ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 3 reading as follows:

“They also concluded upon building and constructing and equipping a large stamp-mill of about 150 or 200 stamps at or near the portal of said crosscut and working tunnel and to build and construct a

flume and pipe-line to take from Gold Creek a large quantity of water and convey it from a point at or near where the water had been diverted from the creek in connection with the said 15-stamp mill, which is at the upper end of the group of claims, to a point near the portal of the tunnel and at the place where it was decided to erect the 150 or 200-stamp mill, and to erect such other buildings and install such other machinery so as to carry out the plans decided upon."

FORTY-FOURTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting Finding of Fact No. 4 as made and adopted by the Court, which is in words and figures as follows, to wit:

"The Court further finds that as early as October, 1880, the miners in and near the vicinity of Juneau and Silver Bow Basin, including the territory covered by the Ebner Company's group of mining claims, diverted and appropriated water from streams to be used for mining and other beneficial purposes and ever since about that date it has been the universal practice and general custom for any person or corporation desiring to appropriate water for the purposes last above mentioned to post a notice in writing in a conspicuous place at the intended point of diversion on the creek or stream from which the water is expected to be diverted or taken; that the posting of such notice has always been considered under such general custom of miners as the first step taken looking towards the appropriation and apply-

ing the water to mining or some other beneficial use as well [2411] as showing the intention of the person or corporation posting the notice and giving warning and notice to others of the poster's intention of utilizing such water.

And the Court further finds that the posting of the notice in the manner above mentioned does serve the purpose above stated. That the said H. T. Tripp knew of the above mentioned customs, and while examining and exploring the group of mining claims of the said Ebner Gold Mining Company as stated in these Findings, on the 29th day of June, 1910, attached to a board and posted in a conspicuous place on the Ebner Gold Mining Company's dam which had been constructed for the purpose of diverting the water and conducting it to the 15-stamp mill, a written notice claiming 10,000 miner's inches of water of the said Gold Creek, which said notice is as follows:

“Notice of Water.

Notice is hereby given to all whom it may concern that I, the undersigned, claim 10 thousand miner's inches of the water flowing in this creek or any part of 10 thousand miner's inches that may be flowing at any season of the year to be conveyed by ditch, flume or pipe along the bank of Gold Creek with pipe or flume or both to any place on the property known as the Ebner Mine or to carry across or farther than the limits of the said mine property. This location is made on the ground this day and date and is posted at the place known as the Ebner dam about $1\frac{3}{4}$

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miles up from Juneau, Alaska, on Gold Creek.

Dated this 20th day of June, 1910.

Time 7:30 A. M.

Locator—H. T. TRIPP.

Witness:

JOHN SOINI.”

That said notice could be plainly seen from a public highway which runs up Gold Creek and in close proximity to said dam on which said notice was posted. That while said H. T. Tripp signed or affixed his own name to the notice, the said making out of said notice and posting of the same, and said step so taken looking towards the applying of said amount of water to use for mining or other beneficial purposes, was done by the said Tripp on behalf of and for the said group of mining claims of the Ebner Gold Mining Company and parties interested therein, and said water was intended to be conducted down over and across the said group of mining claims from the point of intake of the said defendant company to the mill site and tunnel portal on the Cape Horn No. 2 claim at the lower end of the Ebner property, and there to be used and applied to the air-compressor and the new mill to be built, and for mining purposes generally, as had been contemplated under the Ebner and Tripp scheme of opening up, mining and operating said property on a larger scale as had been referred to in these Findings. [2412]

FORTY-FIFTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of

Fact No. 4 reading as follows:

“And ever since about that date it has been the universal practice and general custom for any person or corporation desiring to appropriate water for the purposes last above mentioned to post a notice in writing in a conspicuous place at the intended point of diversion on the creek or stream from which the water is expected to be diverted or taken.”

FORTY-SIXTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 4, reading as follows:

“Posting of such notice was always considered under the general custom of miners as the first step taken looking toward the appropriation and applying of water.”

FORTY-SEVENTY ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 4, reading as follows:

“That said notice could be plainly seen from a public highway which runs up Gold Creek and in close proximity to said dam on which said notice was posted.”

FORTY-EIGHTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 4, reading as follows: [2413]

“That while said H. T. Tripp signed or affixed his own name to the notice, the said making out of said notice and posting of the same, and said step so taken looking towards the applying of said amount of water to use for mining or other beneficial purposes, was done by the said Tripp on behalf of and for the said group of mining claims of the Ebner Gold Mining Company and parties interest therein,” and

FORTY-NINTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 4, reading as follows:

“That said water was intended to be conducted down over and across the said group of mining claims from the point of intake of the said defendant company to the mill site and tunnel portal on the Cape Horn No. 2 claim at the lower end of the Ebner property and there be used and applied to the air-compressor and the new mill to be built, and for mining purposes generally, as had been contemplated under the Ebner and Tripp scheme of opening up, mining and operating said property on a larger scale as has been referred to in these findings.”

FIFTIETH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 4, reading as follows:

“To the mill site and tunnel portal on the Cape Horn No. 2 claim at the lower end of the Ebner property.”

FIFTY-FIRST ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting Finding of Fact No. 5 as made and adopted by the Court, which is in words and figures as follows, to wit: [2414]

The Court further finds that the action of said Tripp in posting of said notice mentioned in the finding above set forth was the first step taken by anyone looking towards the future diversion and appropriation of the water of Gold Creek, and said action of said Tripp was prior to any step taken by plaintiff, or any intention made manifest by plaintiff, of taking any water from Gold Creek and applying it to mining or other beneficial use, and was prior to the posting of any water location notice by said plaintiff.

That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was posted, and after actual diversion of the water at such point, did the plaintiff do anything that would give notice to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek.

FIFTY-SECOND ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 5, reading as follows:

“The Court further finds that the action of said Tripp in posting of said notice mentioned in the finding above set forth was the first step taken by anyone looking towards the future diversion and appropriation of the water of Gold Creek, and said action of said Tripp was prior to any step taken by plaintiff, or any intention made manifest by plaintiff, of taking any water from Gold Creek and applying it to mining or other beneficial use, and was prior to the posting of any water location notice by said plaintiff.

FIFTY-THIRD ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 5, reading as follows:

“That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was posted, and after actual diversion of the water at such point, did the plaintiff do anything that would give notice [2415] to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek, excepting only the posting of the notice referred to in the complaint as the Mulligan notice.”

FIFTY-FOURTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting Finding of Fact No. 7 as made and adopted by the

Court, which is in words and figures as follows:

That by certain mesne conveyances said H. T. Tripp a long time before the commencement of this action assigned or conveyed whatever right or title he acquired by reason of posting the notice signed by him, to the defendant, *Ebner Gold Mining Company*.

That work was commenced under said Tripp notice and those for whom said water was located and their successors in interest have proceeded with due diligence with their work in the opening up and developing of said mining property and the application of the water of Gold Creek under said notice to actual use. The tunnel mentioned in these findings which had been decided upon to be driven by said Tripp and Ebner was soon after the filing of said notice surveyed out, commencing at the lower end of the said group of claims on Cape Horn No. 2 lode claim, and extending to the upper end of said group of claims to what is known as the old Ebner Workings, about the point of the 15-stamp mill, and had been driven at the time of the commencement of this action 2600 feet and taps the ore bodies of said group of claims at various depths, being from the bottom of said tunnel to the surface about — feet. That a right of way was surveyed out for a high-line flume which had been decided upon by said Ebner and Tripp, said survey commencing at the point where the Tripp location notice was posted and extending around the hill side across the Ebner property to a point near the portal of the tunnel and the mill site, which said flume is $3\frac{3}{4}$ feet by 4 feet

and about 4000 feet long, and has a carrying capacity of approximately 3200 miner's inches of water, and had been completed at the time of the commencement of this action. Lumber and material were purchased for a 200-stamp mill, and most of the machinery bought to equip said mill, the mill site graded at or near the portal of said tunnel, and at or near the point where the water was to be conveyed. That on the 14th day of September, 1910, water was diverted from Gold Creek at a point where the Tripp notice was posted, said water run through a large open cut made for the purpose of laying the new flume, and this diversion of the water from Gold Creek was prior to any diversion therefrom [2416] made by the plaintiff herein. The new flume line above referred to was completed from a point on Gold Creek where the Tripp notice was posted to the penstock of said Company on the 15th day of December, 1910. Work was commenced on the tunnel above referred to on or about the — day of —, 1910, and was diligently and actively kept up, said tunnel being 8 feet by 8 feet, and as above stated had been driven 2600 feet at the time of the commencement of this action, and at the time of filing the answer in this cause there had been over 4000 feet of tunnelling, crosscuts and drifts completed. That before the commencement of this action a large new air-compressor plant had been erected near the mouth of the tunnel and a pipe-line leading from the penstock above mentioned to the air-compressor, and in August, 1913, said pipe-line was connected up with said air-compressor and the water used for

power in running the same, and said air-compressor was used in continuing the driving of the new tunnel referred to in *these* finding and has been applied to that use ever since said last-mentioned date. Prior to the commencement of this action the lumber and material referred to herein for the building of the 200-stamp mill as well as the machinery for the equipment of the said mill had been purchased and forwarded to Juneau, Alaska, and most of the same on the mill site near the place of the erection of the new mill. That since the commencement of this action and at the time of the trial of the same, work has progressed on said property with due diligence and from time to time larger quantities of water taken from Gold Creek through the said new flume and applied to use by the defendant company as necessity demanded.

FIFTY-FIFTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 7, reading as follows:

“That by certain mesne conveyances said H. T. Tripp a long time before the commencement of this action assigned or conveyed whatever right or title he acquired by reason of posting the notice signed by him, to the defendant, Ebner Gold Mining Company.”

FIFTY-SIXTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of

Fact No. 7, reading as follows: [2417]

That work was commenced under said Tripp notice and those for whom said water was located and their successors in interest have proceeded with due diligence with their work in the opening up and developing of said mining property and the application of the water of Gold Creek under said notice to actual use."

FIFTY-SEVENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 7, reading as follows:

"The tunnel mentioned in these findings which had been decided upon to be driven by said Tripp and Ebner was soon after the filing of said notice surveyed out, commencing at the lower —"

FIFTY-EIGHTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 7, reading as follows:

"That a right of way was surveyed out for a high-line flume which had been decided upon by said Ebner and Tripp, said survey commencing at the point where the Tripp location notice was posted and extending around the hill side across the Ebner property to a point near the portal of the tunnel and the hill site, which said flume is about 4000 feet long and had been completed at the time of the commencement of this action."

FIFTY-NINTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 7, reading as follows:

“Lumber and material were purchased for a 200-stamp mill, and most of the machinery bought to equip said mill, the mill site graded at or near the [2418] *the* point where the water was to be conveyed.”

SIXTIETH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 7, reading as follows:

“That on the 14th day of September, 1910, water was diverted from Gold Creek at a point where the Trip notice was posted, said water run through a large open cut made for the purpose of laying the new flume, and this diversion *pf* the water from Gold Creek was prior to any diversion therefrom made by the plaintiff herein.”

SIXTY-FIRST ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 7, reading as follows:

“The new flume line above referred to was completed from a point on Gold Creek where the Tripp notice was posted to the penstock of said company on the 15th day of December, 1910.”

SIXTY-SECOND ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 7, reading as follows:

“Work was commenced on the tunnel above referred to on or about the —— day of ——, 1910, and was diligently and actively kept up, said tunnel being 8 feet by 8 feet, and as above stated had been driven 2600 feet at the time of the commencement of this action, and at the time of filing the answer in this cause there had been over 4000 feet of tunneling, crosseuts and drifts completed.” [2419]

SIXTY-THIRD ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, error in making and adopting Finding of Fact No. 9, as made and adopted by the Court, which is in words and figures as follows:

“That the tunnel being driven by the defendant, the Ebner Gold Mining Company, referred to in these findings, is being driven through the group of Ebner lode mining claims, known as the Ebner mine, being the group of lode mining claims for the benefit of which said water was located by said Tripp, as aforesaid, and all of the work in connection with the development and opening up of the ore bodies in said group of claims since the location of said water by said Tripp has been done with diligence, and \$351,000.00 more or less, expended in opening up such ore bodies in said Ebner Group of lode mining claims, and the work was at the time of the trial still pro-

gressing with diligence. That all of said work was being done for the purpose of opening up the Ebner group of lode mining claims as a mine so that the bodies of ore within the exterior boundary lines of said group of claims could be opened up and mined, and the ores milled and treated, and the precious meals extracted therefrom."

SIXTY-FOURTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 9, reading as follows:

"That the tunnel being driven by the defendant, the Ebner Gold Mining Company, referred to in these Findings, is being driven through the group of lode mining claims for the benefit of which said water was located by said Tripp, as aforesaid."

SIXTY-FIFTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 9, reading as follows: [2420]

"And all of the work in connection with the development and opening up of the ore bodies in said group of claims since the location of said water of said Tripp has been done with diligence, and \$351,000.00, more or less, expended in opening up such ore bodies in said Ebner group of lode mining claims, and the work was at the time of the trial still progressing with diligence."

SIXTY-SIXTH ERROR ASSIGNED.

The District Court for the Territory of Alaska,

Division Number One, erred in making and adopting Finding of Fact No. 10, as made and adopted by the Court, which is in words and figures as follows:

“With reference to the rules and regulations which plaintiff sets out in its reply and claims were adopted by the miners of Harris Mining District in 1882, covering and governing the appropriation and diversion of water from streams for mining and other beneficial uses, the Court finds, after careful consideration of the evidence and the law relating to such rules and regulations, that they never were followed by the miners and were never put in force, or, if they ever were followed or put in force, they fell into disuse and became obsolete before the rights of either of the parties to this action were claimed to be initiated, and that they are inconsistent with the general laws of the United States and could not be in force since the extension of organized government to Alaska in the year of 1884, and are therefore of no effect in the determination of the issues in this case.

SIXTY-SEVENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 10, reading as follows:

“With reference to the rules which plaintiff sets out in its reply and claims were adopted by the miners of Harris Mining District in 1882, covering and governing the appropriation and diversion of water from streams for mining and other beneficial uses, the Court finds, after careful consideration of

the evidence and the law relating to such rules and regulations, that they never were followed by the miners and were never put in force.” [2421]

SIXTY-EIGHTH ERROR ASSIGNED.

The District Court of the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 10, reading as follows:

“Or, if they ever were followed or put in force, they fell into disuse and became obsolete before the rights of either of the parties to this action were claimed to be initiated.”

SIXTY-NINTH ERROR ASSIGNED.

The District Court of the Territory of Alaska, Division Number One, erred in making and adopting as its Finding of Fact that portion of Finding of Fact No. 10, reading as follows:

“And that they are inconsistent with the general laws of the United States and could not be in force since the extension of organized government to Alaska in the year of 1884, and are therefore of no effect in the determination of the issues in this case.”

SEVENTIETH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in making and adopting Finding of Fact No. 11 as made and adopted by the Court, which is in words and figures as follows:

“The Court further finds that the work of diversion, appropriation and application of the water from Gold Creek by the defendants herein was prosecuted to completion with reasonable diligence from the time of the inception of said right.”

SEVENTY-FIRST ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in adopting as the Conclusion of Law and in concluding as a matter of Law, as follows:

Conclusion of Law.

I.

That as against the plaintiff, the defendant is [2422] the owner of and entitled to the first use of 10,000 miner's inches of water, to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted.

SEVENTY-SECOND ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in adopting as the Conclusion of Law and in concluding as a matter of law, as follows:

Conclusion of Law.

II.

That whatever rights plaintiff has in the water of Gold Creek by reason of anything set forth in its complaint, is subsequent, inferior and subordinate to the rights of the defendant, as set forth in these Findings.

SEVENTY-THIRD ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in adopting as the Conclusion of Law and in concluding as a matter of law, as follows:

Conclusion of Law.

III.

That the plaintiff is not entitled to the relief asked for or to any relief.

SEVENTY-FOURTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Divison Number One, erred in entering its decree herein in favor of the defendant and against the plaintiff.

HELLENTHAL & HELLENTAL,
Attorneys for Appellant.

Due service of the foregoing admitted this 25th day of April, 1916.

WINN & BURTON,
Attorneys for Appellee.

Filed in the District Court, District of Alaska, First Division. Apr. 26, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [2423]

O. K.—W. & B.

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

*In the United States Circuit Court of Appeals for
the Ninth Circuit, Holden at San Francisco.*

ALASKA JUNEAU GOLD MINING COMPANY,
a Corporation,

Appellant,

vs.

THE EBNER GOLD MINING COMPANY, a Corporation, et al,

Appellee,

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, the Alaska-Juneau Gold Mining Company,

a corporation, appellant herein, and John Beck, surety, all residents of the Territory of Alaska, are held firmly bound unto the above-named Ebner Gold Mining Company, a corporation, The Alaska-Ebner Gold Mines Company, a corporation, Angus Mackey, as Receiver for the Alaska-Ebner Gold Mines Company and Downie D. Muir, appellees, in the sum of five thousand (\$5,000.00) dollars, to be paid to the said appellees, for the payment of which well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors, administrators and assigns and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of April, in the year of our Lord, one thousand nine hundred and sixteen.

Whereas the above-named Alaska-Juneau Gold Mining [2424] Company, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and decree rendered in the above-entitled suit by Robert W. Jennings, Judge of the District Court for the Territory of Alaska;

Now, therefore, the condition of this obligation is such that if the above-named Alaska-Juneau Gold Mining Company shall prosecute its said appeal to effect and answer all damages and costs, if they fail to make said appeal good then this obligation shall

be void; otherwise the same shall be in full force and effect.

ALASKA-JUNEAU GOLD MINING COMPANY,

By J. A. HELLENTHAL,
Its Attorney.

JOHN RECK,

Surety.

APPROVED:

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska,
First Division. Apr. 26, 1916. J. W. Bell, Clerk.

By C. Z. Denny, Deputy. [2425]

O. K.—W. & B.

*In the District, Court for the District of Alaska,
Division Number One, at Juneau.*

*In the United States Circuit Court of Appeals for
the Ninth Circuit, Holden at San Francisco.*

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Appellant,

vs.

THE EBNER GOLD MINING COMPANY, a Corporation, THE ALASKA-EBNER GOLD MINES COMPANY, a Corporation, ANGUS MACKAY, as Receiver for the ALASKA-EBNER GOLD MINES COMPANY and DOWNIE D. MUIR.

Appellees.

Citation on Appeal.

United States of America,—ss.

To the Ebner Gold Mining Company, a Corporation,
The Alaska-Ebner Gold Mines Company, a Corporation, Angus Mackey as Receiver for the Alaska-Ebner Gold Mines Company and Downie D. Muir, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty (30) days from and after this date, pursuant to an appeal filed in the Clerk's office of the District Court for the Territory of Alaska, Division Number One, at Juneau in the above-entitled cause, wherein the Alaska-Juneau Gold Mining Company, a corporation, the appellant herein, was the plaintiff and the Ebner Gold Mining Company, a corporation, The Alaska-Ebner Gold Mines Company, a corporation, Angus Mackey, and Downie D. Muir the appellees herein, were defendants, to show cause, if any there be, why the judgment and decree entered in said cause of the Alaska-Juneau Gold Mining Company, plaintiff, vs. The Ebner Gold Mining Company, a corporation, The Alaska-Ebner Gold Mines [2426] Company, a corporation, Angus Mackey, as Receiver for the Alaska-Ebner Gold Mines Company and Downie D. Muir, defendants, and referred to in the petition for an appeal filed in said cause, which said appeal was by order of the Court allowed as prayed for, should not be corrected and speedy

justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States this 26 day of April, in the year of our Lord one thousand nine hundred and sixteen.

ROBERT W. JENNINGS,
Judge of the District Court for the Territory of
Alaska, Division Number One.

Copy of the foregoing Recd. and Service admitted,
Apr. 26, 1916.

WINN & BURTON,
Attys. Appellees.

Filed in the District Court, District of Alaska,
First Division. Apr. 26, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [2427]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

Case No. 1074-A.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a Corporation,
THE ALASKA-EBNER GOLD MINES COMPANY, a Corporation,
ANGUS MACKAY, as Receiver for the ALASKA-EBNER GOLD MINES COMPANY and
DOWNIE D. MUIR,

Defendants.

**Order Directing Transmission of Original Exhibits
to Appellate Court.**

Upon stipulation of the parties, it is ORDERED by the Court that the Clerk of this court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, each and all of the exhibits received in evidence during the progress of the above-entitled cause for use in connection with the printing of the record and the argument and presentation of this cause before the said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 1st day of May, 1916.

ROBERT W. JENNINGS,
Judge.

OK.—JNO. R. WINN.

Filed in the District Court, District of Alaska,
First Division. May 1, 1916. J. W. Bell, Clerk.
By L. E. Spray, Deputy. [2428]

*In the District Court for the Territory of Alaska,
Division Number One, at Juneau.*

No. 1074—A.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Plaintiff,

vs.

THE EBNER GOLD MINING COMPANY, a Cor-
poration, et al.,

Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the District Court for the District of Alaska, Division Number One:

You will please prepare a transcript of the record in the above-entitled cause, and transmit the same to the Circuit Court of Appeals for the Ninth Circuit, to be used in the hearing of the appeal herein, said transcript to include copies of the following files in this cause, to wit:

1. Complaint;
2. Order allowing correction of complaint by interlineation, filed January 10, 1914;
3. Motion to amend complaint, filed March 19, 1914;
4. Order allowing amendments to complaint, filed March 20, 1914;
5. Answer; to complaint and amendments;
6. Reply to answer;
7. Motion to amend reply, filed July 10, 1914;
8. Order allowing amendments to reply, filed July 13, 1914;
9. Motion to amend reply by substitution, filed July 17, 1914;
10. Minute order allowing amendments to reply, by interlineation or substitution, entered July 20, 1914;
11. Opinion, preliminary hearing;
12. Memorandum decision, filed April 30, 1915;
13. Judgment and decree;
14. Bill of exceptions;
15. Petition for appeal and order allowing same;

16. Assignment of errors;
17. Bond on Appeal;
18. Citation on appeal, together with the acknowledgment of service thereon by appellee;
19. Order on stipulation, re transmitting exhibits;
20. This praecipe;

.. All of which are to be prepared with the view of transmitting the same to the United States Circuit Court of Appeals for the Ninth Circuit, in connection with the appeal herein, within the time limited by the rules of that court.

HELLENTHAL & HELLENTHAL,
Attorneys for Alaska-Juneau Gold Mining Company.

· Filed in the District Court, District of Alaska, First Division. Apr. 26, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [2429]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 2429 pages of typewritten matter numbered from 1 to 2429, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, as per

the praecipe of the plaintiff in error, on file herein and made a part hereof, in the cause wherein the Alaska-Juneau Gold Mining Company, a corporation is plaintiff in error, and The Ebner Gold Mining Company, a corporation, The Alaska-Ebner Gold Mines Company, a corporation, Angus Mackey, as Receiver for the Alaska-Ebner Gold Mines Company, and Downie D. Muir, are defendants in error, No. 1074-A, as the same appears of record and on file in my office, and that the said record is by virtue of an appeal and citation issued in this cause and the return thereof in accordance therewith.

I do FURTHER CERTIFY, that this transcript was prepared by me in my office, and the cost of preparation, examination, and certificate, amounting to \$958.10 has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled Court, this 5th day of May, 1916.

[Seal]

J. W. BELL,
Clerk.

2746 *Alaska-Juneau Gold Mining Company vs.*

[Endorsed]: No. 2795. United States Circuit Court of Appeals for the Ninth Circuit: Alaska-Juneau Gold Mining Company, a Corporation, Appellant, vs. Ebner Gold Mining Company, a Corporation, The Alaska-Ebner Gold Mines Company, a Corporation, Angus Mackey, as Receiver for The Alaska-Ebner Gold Mines Company, a Corporation, and Downie D. Muir, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed May 15, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

ALASKA JUNEAU GOLD MINING COMPANY,
Appellant,

vs.

EBNER GOLD MINING COMPANY, et al.,
Appellees.

BRIEF OF APPELLANT.

J. A. HELLENTHAL,
CURTIS H. LINDLEY,
Attorneys for Appellants.

THE JAMES H. BARRY CO.

Filed

OCT 11 1916

F. D. Monckton,
Clark.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

ALASKA JUNEAU GOLD MINING COMPANY,	<i>Appellant,</i>	} No. 2795
vs.		
EBNER GOLD MINING COM- PANY, et al.,	<i>Appellees.</i>	

BRIEF OF APPELLANT.

This is an action brought by the Alaska Juneau Gold Mining Company, appellant here and plaintiff in the court below, against the Ebner Gold Mining Company and others, appellees and defendants below, to enjoin them from interfering with appellant's asserted rights to the use of a certain portion of the waters of Gold Creek near Juneau, Alaska, and from diverting such waters to the detriment and injury of appellant. In effect the purpose of the action is to determine as between appellant and the appellee, Ebner Gold Mining Company, appellant's right to the uninterrupted enjoyment and use of such portion

of the waters of that stream as it is asserted appellant had theretofore appropriated, diverted and used. The appellees other than the Ebner Company are nominal parties. The real controversy is between the Alaska Juneau and the Ebner Companies, both parties having at the time the action was commenced diverted the water of the Creek, the diversion by the Ebner Company depriving the Alaska Juneau of the full enjoyment of its rights as asserted in the action. The crucial question in the case is that of priority of right.

The trial Court awarded judgment in favor of the appellee, from which judgment this appeal is prosecuted.

In the discussion which follows, the appellant will be referred to as the Alaska Juneau Company, and the appellee as the Ebner Company.

STATEMENT OF THE CASE.

Gold Creek is a natural stream of water having its source in the mountains situate above Silver Bow Basin, a few miles easterly from the town of Juneau, Alaska, from whence it flows through a series of basins and canyons in a westerly direction into Gastineau Channel, an arm of the Pacific Ocean, collecting the waters of small streams and tributaries along its course.

The section of the country traversed by the stream, and in which the diversion works of the respective parties have been constructed, is rocky, precipitous,

and covered with brush. The character of the topography may be observed from the photographs introduced in evidence, among which are plaintiff's Exhibits 11 to 15, appearing on pages 1947 to 1951, Volume V of the Record. During the spring and summer months, and for an average period probably of six months in the year, there is a large volume of water sufficient to supply the requirements of both parties. The volume decreases with the cold weather, and the flow becomes comparatively small and insufficient.

The rights asserted by the Alaska Juneau to the waters of this creek had their origin on August 1, 1910. It claims that all the acts and things done by it in connection with the diversion and use of the water relate back to that date. The acts and things done, through which the doctrine of relation is invoked by the Alaska Juneau, will be narrated hereafter. The purpose of naming the date at this juncture is to inform the Court as to the status of the waters of the stream with regard to appropriation and user at the time the rights of the Alaska Juneau attached, and to familiarize the Court with the physical features as they existed at that date.

This status and the physical features may be explained by reference to Plaintiff's Exhibit 1, appearing in Volume V of the Record, at page 1934, bearing the legend, "Map Showing Alaska Juneau and Ebner Properties." (The reproduction of this map in the

record is faint and unsatisfactory, and resort should be had to the original, which is on file with the Clerk.) At a point on Gold Creek marked "Ebner Dam," in the upper left hand corner of the map, the Ebner Company many years prior to Aug. 1, 1910, diverted the water by means of a dam and flume, the intake of the flume being on the South or left bank of the creek going down stream, and the flume being constructed on the same side of, and at an elevation above, the creek. From the Ebner Dam the water was conducted by the Ebner Company by means of this flume to a point above the Old Ebner Mill, where it was conducted into a penstock, and through this means power was obtained to operate the old mill, equipped at first with 10, and afterwards with 15 stamps.

Subsequently a new mill was planned by the Ebner, and the building constructed lower down stream at the point marked on Plaintiff's Exhibit 1 "New Ebner Mill and excavation for enlargement." This mill building is shown on the photograph, Plaintiff's Exhibit 27, appearing in Volume V of the Record, at page 1971. The stamps were never placed in the mill building, but the Ebner Company installed therein an air compressor. Water was conducted to this by flume and pipe line, and compressed air manufactured for operating drills and other purposes.

All the water thus diverted and used by the Ebner Company was returned to the creek, and resumed

its natural course to the sea, practically undiminished as to quantity. While for some years the property was not operated, and the water was not used, the right of the Ebner Company to the water so diverted and used is not here challenged. The diversion of the Alaska Juneau here involved is at a point below where the water was returned to its natural channel and where so far as any physical evidences on the ground were concerned, the water was on August 1, 1910, subject to appropriation by the next comer. The point of diversion of the Alaska Juneau is at the place marked on Plaintiff's Exhibit 1, "Alaska Juneau Dam."

Some time after August 1, 1910, after the Alaska Juneau had commenced its work preparatory to diversion and during hostilities and litigation which followed, the Alaska Juneau was for the first time informed that on June 20, 1910, one H. T. Tripp, had posted a notice of appropriation of water at the site of the original Ebner Dam, and on the same side of the creek as the intake of the Old Ebner Flume, and that the Ebner Company claimed some rights under this notice. This notice was, as testified to by Tripp himself, torn down in July, 1910 (Record, Vol. 2, p. 584). It was not recorded until October 25, 1910, prior to which time the Alaska Juneau had actually diverted the water through its intake at the Alaska Juneau Dam. As we will hereafter endeavor to point out, Tripp was not at any time in privity with the

Ebner Company, and that company did not succeed to his rights, whatever they may have been, until May 21, 1914.

As this is the notice upon which the Ebner Company relies, and upon which the Court below based its decision, as giving to the Ebner Company priority over the Alaska Juneau, and under which that company justifies its subsequent diversion at the same Old Ebner Dam, taking the water out on the North or opposite side of the creek, conducting it down the opposite bank, and returning it to the creek at "Shady Bend," or on the Cape Horn No. 2 Lode Claim below the Alaska Juneau Dam, it will be a subject of serious discussion later on. Our present purpose is mainly one of narration of events in as near a chronological order as the subject permits.

This was the condition of affairs on August 1, 1910. It is necessary to briefly state the sequence of events occurring on and subsequent to that date. The facts narrated are without substantial conflict, unless otherwise noted.

ACTIVITIES OF ALASKA JUNEAU.

For the purpose of this narration, we epitomize briefly the testimony of Kinzie, the General Superintendent of the Alaska Juneau, who was in the immediate charge of the activities of that company. He is substantially corroborated as to all material facts.

His testimony on this branch of the case appears in Volume I of the Record, pages 182 *et seq.*

Early in July, 1910, a preliminary line was surveyed by the Alaska Juneau from a point on Gold Creek to a point on Gastineau Channel, where it was contemplated that a mill (since partially completed) was to be built, and the waters of Gold Creek were to be conducted in accordance with early plans of the company previously testified to by Kinzie (Record, p. 181). This flume line was laid out under the immediate direction of Jones, Superintendent acting under Kinzie, and a number of mining locations along the line of the flume between Gastineau Channel and the proposed intake of the flume were made on July 11, 1910 (Record, Vol. II, pp. 488, *et seq.*), which locations would prove serviceable for right of way, in addition to other purposes.

On August 1, 1910, Kinzie, the General Superintendent of the Alaska Juneau, sent L. D. Mulligan to locate the water of Gold Creek (Rec., p. 182), and on the same day Mulligan posted a notice claiming 20,000 inches of the flow of the creek (Rec., p. 442). The notice was introduced in evidence as Plaintiff's Exhibit No. 24 (Rec., p. 1959, Vol. V). It was claimed by the Ebner Company that the place of posting was on the patented Lotta claim of that company, and while there is a great deal of uncertainty as to where the true boundary lines of the Lotta were, owing to conflicts between the field notes of the patent

survey, tie calls and patent plats with what were claimed to be the stakes and monuments on the ground, the District Court of Alaska in other litigation between the same parties, to be hereafter noted, determined in effect that the notice was so posted on the Lotta claim, a short distance above the Alaska Juneau Dam, and for the purpose of this case it will be so assumed. The legal value of this notice as a muniment of title, and the effect of its posting on Ebner ground, will be noted when discussing the legal problems involved. This notice was recorded on August 8, 1910. Mulligan conveyed his rights thus originating to the Alaska Juneau on August 2, 1910 (Rec., p. 1961, Vol. V). On the same day this notice was posted (August 1), Kenzie sent O. M. Harri to Gold Creek to make preliminary arrangements to accommodate a crew of men who were to work on the construction of flumes, tunnel, etc., brush out trails, etc. Lumber was provided for the building of a bunk house for the men. By August 3rd, five men were at work (including two Indians) brushing out trails (Rec., p. 395). On August 5th, trails had been constructed on both sides of the creek, steps had been cut in the rock at Snow Slide Gulch; four or five men were at work, and carpenters were building the bunk house. From August 1, commencing with one man, the force was increased as rapidly as they could be properly employed until in November it numbered fifty or sixty men. Preliminary work, such as trails,

etc., had been advanced by the latter part of August, so as to permit of construction of the grade for the flume. A water tunnel was started at Snow Slide Gulch to carry the water under the surface and protect the flume from snow slides. Early in September actual grade construction was started (Rec., p. 193). In the latter part of September work on the dam was started. This work was interfered with by men rolling rocks down from above on the opposite bank and blasting rocks, driving the men out of the creek where they were working (Rec., p. 195).

On October 3, 1910, the Alaska Juneau dam was completed, flume started, and water turned in. In the construction of this dam it was intended to be located on land south of the patented south side line of the Lotta claim owned by the Ebner and upon unpatented land claimed by both parties, and subsequently, as hereafter noted, adjudicated to be on government land. The timbers were laid diagonally across the creek, so that the upper end of such timbers rested for a short distance on the patented Lotta claim of the Ebner. The headgate and intake of the flume, however, were on government land.

On the night of October 3, the flume was crushed by blasting and rolling down rocks, and blasting was continued on October 4th (see Plaintiff's Exhibit 9, Rec., p. 1941). These acts were done by men acting under instructions of a man by the name of Bent, who claimed to represent one F. L. Underwood, or the

California Nevada Copper Company, through whom the Ebner now claims to have succeeded to whatever rights were acquired through the Tripp water notice and the subsequent acts of Bent and his employees.

A temporary flume was built by the Alaska Juneau around the point at Snow Slide Gulch to conduct the water until the water tunnel was completed. An air compressor was installed at Snow Slide Gulch, for the purpose of manufacturing compressed air for use in driving tunnels, and was first started on November 17, 1910. The flume line was ultimately completed and water conducted to the millsite of the Alaska Juneau on the Gastineau Channel, at the place shown on Plaintiff's Exhibit 1, where it was first used to sluice off the banks for mill foundation. After the mill was constructed, water was used for battery and other purposes and sluicing tailings into the channel. The cost of this water diversion was in the neighborhood of \$90,000. The mill then in contemplation was to have a capacity of 12,000 tons per day (Rec., p. 211). This mill is now in course of construction.

On September 14, 1910, a notice of appropriation, amending the Mulligan notice, was posted by the Alaska Juneau, but was not recorded (Rec., p. 208).

On May 8, 1911, the Alaska Juneau posted what may be here termed a supplementary or amended notice referring to the Mulligan notice, and posted the same at the place where the Alaska Juneau Dam had been constructed, and recorded such notice on

the same day (Plaintiff's Exhibit No. 10, Rec. Vol. V, p. 1943). The legal value of these notices will be discussed when we reach the law problems involved.

From the time that Harri was first sent by the Alaska Juneau on to the ground, on August 1, 1910, the work was continuously and vigorously prosecuted, with as many men at a time as could be employed, until the water was finally conducted to the Alaska Juneau millsite on the Gastineau Channel.

The flume line of the Alaska Juneau on the South side of the creek (left hand going down stream) is shown on Plaintiff's Exhibit 1. The new flume of the Ebner Company which takes the water out of the creek at the Old Ebner Dam and above the Alaska Juneau Dam, is also shown on the exhibit on the north side of the creek. By means of this new Ebner flume the water is returned to the creek, at Shady Bend or on the Cape Horn No. 2 Lode Claim, below the dam of the Alaska Juneau, thus depriving the Alaska Juneau of water at the times when there is not sufficient to supply the requirements of both parties.

ACTIVITIES CLAIMED IN BEHALF OF THE EBNER COMPANY.

As heretofore noted, the Ebner Company asserts that its rights date from a notice of appropriation made by H. T. Tripp June 20, 1910. At the time this notice was posted and thenceforward until Au-

gust 3, 1910, at which date he was discharged, Tripp was an employee of F. L. Underwood or the California Nevada Copper Company, and was not an employee of the Ebner Company. We expect to point out later that whatever Tripp did and whatever motive prompted him to post that notice, it was not done at the instigation or for the benefit of the Ebner Company, but was a part, and that a purely speculative part, of his activities in behalf of Underwood or the California Nevada Copper Company.

Tripp was succeeded on August 3, 1910, by a man by the name of George Bent, who likewise had nothing to do with the Ebner Company.

Testimony of Judge Winn, Rec., Vol. IV, p.
1231.

The subsequent activities, narration of which follows, were carried on under the Bent regime.

Bent arrived in Juneau the latter part of July, 1910. On August 3, accompanied by Mackay, whom we may call Bent's superintendent, and Wettrick and Hill, his surveyors, he went to Gold Creek. On that day, by the use of a transit set on the south bank of the creek on the line of the Old Ebner flume (south or lefthand side going down), the surveyors projected a level on the hill on the opposite side of the creek (Rec., p. 605). Discussion was had between Bent, Mackay, Wettrick and Hill as to the proper place for a mill site. On the 4th of August they

surveyed a preliminary line, and began using it on August 6 (609). The data obtained prior to that time was in a general way to find out where the projected line of operations would lead them, and what kind of a country they would go over (610). On August 6th a decision as to the place where the mill was to be erected was arrived at (721) and they started to run out a flume grade (611). The locality selected for the mill is commonly called "Shady Bend" and on a certain mining claim known as Cape Horn Lode No. 2 claim, and is shown on Plaintiff's Exhibit 1 on the lower lefthand side of the map, and on Defendant's Exhibit S, Record, page 2168, a copy of which is also attached to the decree herein (Rec., p. 2681, Vol. VII).

On August 17th, the Ebner Company, by John R. Winn, its agent, posted at the Old Ebner Dam, and on the same day recorded a notice, which appears in the Record at page 2218. The notice stated that the Ebner Gold Mining Company is the owner and claims under this notice all the waters of the creek to its entire flow during all seasons and at all time or times that said corporation is not already entitled to by reason of prior right or appropriation. The legal value of this notice will be discussed when we reach the argument of the law problems involved.

On August 25, 1910, the Ebner Company commenced suit against the Alaska Juneau, wherein it sought to obtain an injunction inhibiting the Alaska

Juneau from diverting the water, alleging that the acts constituting a continuous trespass looking to such diversion, had occurred continuously from July 27, 1910, to the date of the commencement of the action (Rec., p. 1963). The injunction was denied September 2, 1910 (Rec., p. 2039). The work of excavating for the new Ebner flume was started in September, 1910. On October 3rd, grade for the new Ebner flume had been completed to the extent of approximately 1000 to 1200 feet (635). The headgate was installed at the Old Ebner Dam (north side of the creek) between the 4th and 5th of October, and one or two lengths of flume put in (637), for the purpose of taking out the water from the north side of the Old Ebner Dam opposite the intake of the old Ebner flume. The new flume was finished in December, 1910 (701).

Excavation was made for a mill, and some mill lumber claimed to be a part of the material manufactured in Seattle in July, 1910, for a 200-stamp mill (Rec., p. 695) was brought to Juneau; also some machinery and an air compressor had been shipped (Rec., pp. 707-708), the latter having, however, been stored in Juneau (Rec., p. 527), none of which, however, were utilized until several years later. No use whatever was made of the new flume until August, 1913. In December, 1910, after the completion of the flume, Mackay started a tunnel in the vicinity of the "Shady Bend" on the Cape Horn No. 2 Lode

Claim, near the millsite, which had been selected August 6th. This tunnel was subsequently driven so as to cross-cut the ore bodies in the Ebner mines lying to the north of the Old Ebner Dam. The position of this tunnel is shown on Defendant's Exhibit S, Record, page 2167, copy of which is attached to the decree (Rec., Vol. VII, p. 2681). From the date of the completion of the new Ebner flume in December, 1910, until August, 1913, the old compressor situated in the new Ebner mill building above the Alaska Juneau dam, was used for power for operating drills used in constructing this new Ebner tunnel, and during all this period the water was turned back into the creek above the Alaska Juneau dam, and the use of such water by the Alaska Juneau through its flume was not interfered with. Work on this tunnel was suspended in October, 1911, at which time it had been extended for a length of 1180 feet (Rec., p. 702).

In the latter part of 1913, the installation of a new air compressor was started by the Ebner Company at "Shady Bend" on the Cape Horn No. 2 Lode Claim (705), and on or about December 17, 1913, for the first time, water from the new Ebner flume was put to a beneficial use, i. e., to operate the new compressor for driving drills in continuing the new Ebner tunnel. This diversion from the Old Ebner Dam in December, 1913, into the new Ebner flume, deprived the Alaska Juneau of the use of the water.

This action was commenced January 7th, 1914. After the suit was commenced a 5-stamp sampling mill was installed at the Shady Bend millsite by parties representing Underwood or the California Nevada Copper Company (Rec., p. 706), and power to drive it was also obtained from water coming through the new Ebner flume. No part of the contemplated 200-stamp mill was ever erected.

The foregoing is, we think, a fair statement of the facts developed at the trial and shown by the record.

There were two other matters which became involved during the trial, which may be here noted preliminary to the discussion of the errors assigned.

Both parties introduced evidence showing, or tending to show, intention on the part of the companies themselves, or those through whom they claim, to establish millsites at points which would require the utilization of the waters of Gold Creek below the point where the waters were turned back into the creek after having been used at the old Ebner mill and compressor above the present site of the Alaska Juneau dam. We apprehend that this intention is of no serious import, unless it was either disclosed by one party to the other, or there was some overt act exhibiting the intention. This feature of the case will be alluded to when discussing the legal problems.

There was also a great deal of testimony tending to show on the part of the Alaska Juneau that there

had been adopted at miners' meetings a code of rules governing the appropriation of water in the Harris Mining District, which rules were in force at the time the various locations were made, which were not followed by Tripp in making his location in June, 1910, and that therefore no title could be predicated on the Tripp notice. On the part of the Ebner Company it was contended that these rules, if they had ever been adopted, had fallen into disuse, and possessed no vitality, and the legal value of the notices was in no way dependent upon obedience to those rules.

As the Court found this issue in favor of the Ebner Company, it will be expedient for us to deal with this question later.

THE DECISION OF THE TRIAL COURT.

The Findings as adopted by the Court are ten in number, an epitome of which may be here stated:

- I. The corporate capacity of the Ebner Company.
- II. The ownership by the Ebner Company of certain mines and mining claims containing gold. Gold Creek flows through these claims and winds its way down to the Ebner Millsites. Gold Creek is a mountain stream with considerable falls and rapids, and at certain seasons carries a large flow of water, and at other seasons the flow is less by reason of the cold

weather. That for many years prior to the commencement of this action the Ebner Company had mined and milled ores taken from the mines at the upper group and operated a stamp mill located on Gold Creek at the upper end of its mines, and also operated an air compressor and machinery necessary for the operation of the mill and compressor. For these purposes water was diverted from Gold Creek and used. This diversion of the water was made at the upper end of said mines, and after using was turned back into the stream.

Note: There is no exception to these findings. They relate to the diversion, use and return of the water to the stream above the Alaska Juneau dam.

III. Sometime in 1908 the Ebner Company and its President and General Manager, Wm. M. Ebner, concluded to open up the properties and mine and mill the ores on a larger scale. For that purpose it was concluded to drive a large working tunnel at the lower end of the property upon what is known as Cape Horn No. 2 lode claim. They also concluded upon building and equipping a 150 or 200 stamp mill, and for this purpose to take the water out of Gold Creek and deliver it to the proposed 200 stamp mill. That during the year of 1909

one H. T. Tripp, who was employed "by persons interested in said group of mines" to look over, examine and explore said mining property on a larger scale, as had been decided by the Ebner Company and Ebner, its President. He finished his examination and made his report the last of June or 1st of July, 1910.

- IV. That in 1880 miners in and near the vicinity of Juneau diverted water from the streams and from that date until the present time it has been the universal custom for any person or corporation desiring to appropriate water to post a notice in a conspicuous place at the intended point of diversion; that the posting of such notice has always been considered under such general custom of miners as the first step looking towards the appropriation and applying the water, and as showing the intention of the person or corporation posting the notice, and giving warning and notice to others of the poster's intention. That H. T. Tripp knew of this custom, and on June 20, 1910, he posted the notice of location referred to in our statement of the case; that said notice was posted in a conspicuous place; that Tripp in signing and making said notice and posting it, was acting on behalf of and for said Ebner group of mines, and parties interested therein, and said water was intended to be conducted

down to Cape Horn No. 2 Lode Claim, as had been contemplated, under the Ebner and Tripp scheme of operating said property on a larger scale.

- V. That the action of Tripp in posting said notice was the first step taken by anyone looking towards the future diversion of water of Gold Creek. The said action of Tripp was prior to any step taken by plaintiff, or intention made manifest by plaintiff to take any water from Gold Creek and apply it to its beneficial use, and was prior to the posting of any other location notice by said plaintiff; that not until after defendant had followed up its first step, namely, posting of notice of actual physical work at the point where this notice was posted, and after actual diversion of the water at such point, did the plaintiff do anything that would give notice to the defendant of any claim that plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek.
- VII. That by mesne conveyances, Tripp long before the commencement of the action, assigned all his rights to the Ebner Company. That work was commenced under said Tripp notice, and

those for whom the said water was located, and their successors in interest, proceeded with due diligence with their work in opening up and developing said mining property. The facts heretofore recited in our statement of the case, with some variation, but unimportant, are recited in this finding, and the conclusion stated that work has progressed on the property with due diligence, and from time to time large quantities of water were taken from Gold Creek through the new Ebner flume.

VIII. That at the time the Alaska Juneau claims that defendants were wrongfully depriving plaintiff of the use of the water of Gold Creek, defendants were using the same, and it was necessary at all times for the Ebner Company to have the use of the water.

IX. That the tunnel being driven by the Ebner Company is being driven through the group of Ebner lode mining claims, and for the benefit of such said water was located by said Tripp, and all the work of opening up the ore bodies on said claims has been done with diligence, \$351,000, more or less, having been expended in opening up such ore bodies.

X. With reference to the rules and regulations which the Alaska Juneau sets out in its reply and claims were adopted by the miners of

Harris Mining District in 1882, the Court finds after careful consideration that they were never followed by the miners, and were never put in force, or if they were ever followed or put in force, they fell into disuse and became obsolete before the rights of either of the parties to this action were claimed to be initiated, and were inconsistent with the general laws of the United States, and could not be in force since the institution of organized government in Alaska in the year 1884, and are therefore of no effect in the determination of the issues of this case.

XI. The Court further finds that the work of diversion, appropriation and application of the water of Gold Creek by the Ebner was prosecuted to completion with reasonable diligence from the time of the inception of the right.

As conclusions of law the Court finds:

1. That the Ebner is entitled to the first use of ten thousand miner's inches of water to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted.
2. That whatever right the Alaska Juneau has in the water of Gold Creek is subordinate to the right of the Ebner.
3. That plaintiff is not entitled to the relief asked for, or to any relief.

All of the findings other than the first two, and all the conclusions of law, are duly excepted to, and the grounds of such exception are fully stated in the record. The foregoing findings and conclusions of law will be discussed in due course.

According to the contention of the Alaska Juneau, the most vital of all the errors committed by the Court is that wherein it determined the question of priority in favor of the Ebner Company, based upon the Tripp notice of June, 1910, and the acts succeeding it. From the opinion of the Court on the application for an injunction (Rec., Vol. I, p. 150), and on the memorandum decision ordering judgment for the Ebner Company dismissing the bill (Rec., Vol. I, p. 159), it is apparent that the trial Court rested its decisions entirely on that notice. That the error is fundamental, we hope to point out in discussing the assignments of error.

ASSIGNMENTS OF ERROR.

Appellant has assigned seventy-four errors as having been committed by the trial Court. They appear in the Record in Volume VII, commencing at page 2686. It will serve no useful purpose to here enumerate any except such as are specially relied upon.

In making up its bill of exceptions and assignment of errors and presenting this appeal to this Court, counsel for appellant were and are guided by the Act of the Legislature of the Territory of Alaska,

approved April 28, 1915, amending Section 1204 of the Compiled Laws of Alaska, relative to findings of fact by the Court in actions of an equitable nature.

This section as amended is as follows:

"Section 1204. All issues of fact in actions of an equitable nature may be tried by the Court, and if tried by the Court, the evidence shall be presented and the trial conducted in the same manner as other actions; Provided, the Court may, in its discretion, refer the case to a referee pursuant to the provisions of this title. In all such actions the Court, in rendering its decisions therein shall set out in writing its findings of fact upon all material issues of fact presented by the pleadings, together with its conclusions of law thereon; but such findings of fact and conclusions of law shall be separate from the judgment, and shall be filed with the clerk, and shall be incorporated in, and constitute a part of, the judgment roll of the case; and such findings of fact shall be subject to review by the appellate tribunal, and may be amended to conform to the evidence. Exceptions may be taken during the trial to the ruling of the Court, and also to its findings of fact, and a statement of such exceptions prepared and settled as in an action, and the same shall be filed with the clerk within ten days from the entering of the decree, or such further time as the Court may allow."

Session Laws of Alaska, 1915, p. 80.

We may eliminate from consideration assignments 1 to 39 inclusive. All matters pertinent to the discussion, and on which appellant relies, may be fully

considered in connection with the remaining assignments.

The errors relied upon attack the Findings and Conclusions of Law. The attacked findings are long, argumentative, full of probative facts, intermixed with conclusions of law, partially expressed inferences, and *non sequiturs*, and it is somewhat difficult to deal with them as units. Inferences stated in one finding lap over into another. It will be seen as we approach the discussion that in most of the instances appellant's principal attack on these findings is directed to the conclusions of law, inferences and *non sequiturs*, so interwoven with the recited facts as to render it difficult to separate them. The probative facts as distinguished from the ultimate ones are not so much a matter of objection as the inferences and conclusions stated in the finding itself and forming a part of it. The manner in which we propose to deal with the situation will be outlined later.

Complying with what we understand to be the rules of this Court as to specifying assignments on which we rely, we herewith enumerate the errors upon which such reliance will be placed. We shall present for the consideration of the Court the matters embraced within the following assignments:

Nos. 40, 41, 42, 43, attack Finding III.

The exceptions taken to this finding appear on pages 2645-2647, Vol. VII, of the Record.

Nos. 44, 45, 46, 47, 48, 49, 50 attack Finding IV.

The exceptions taken to this finding appear on pages 2649-2654, Vol. VII, of the Record.

Nos. 51, 52, 53 attack Finding V.

The exceptions taken to this finding appear on pages 2655-2659, Vol. VII, of the Record.

Nos. 54, 55, 56, 57, 58, 59, 60, 61 and 62 attack Finding VII.

The exceptions taken to this finding appear on pages 2662-2667.

Nos. 63, 64, 65 attack Finding IX.

The exceptions taken to this finding appear on pages 2668-2670.

Nos. 66, 67, 68, 69 attack Finding X.

The exceptions taken to this finding appear on pages 2671-2673, Vol. VII, of the Record.

No. 70 attacks Finding XI.

The exceptions taken to this finding appear on pages 2673-2674, Vol. VII, of the Record.

Nos. 71, 72 and 73 attack the Conclusions of Law.

The exceptions to these conclusions are found on pages 2674-2676, Vol. VII, of the Record.

ORDER OF ARGUMENT.

In order that the Court may be clearly informed as to the contention of appellant in connection with the assignments of error, it is essential to consider and point out certain basic matters in the light of which the entire findings are to be examined in connection with the exceptions. If we may satisfactorily dispose of these fundamentals, the case itself predicated upon them will likewise be effectually disposed of.

We propose therefore on the threshold to take up for analysis, consideration and discussion the connection of H. T. Tripp with the Ebner Company, the circumstances under which the water notice was posted by him, the purposes for which it was done, and all the facts connected with it, and the asserted accession by the Ebner Company to whatever rights he acquired under it.

We shall also consider the antecedent "intention" of the Ebner Company in previous years, and the relationship of such intentions to the Tripp notice.

We shall also take up for discussion the laws governing the acquisition of water rights in Alaska, and the legal value of the Tripp appropriation. After this survey we may take up the assignments of error.

THE WATER APPROPRIATION BY H. T. TRIPP AND HIS
RELATION TO THE EBNER COMPANY.

In the opinion of the Court, denying an application of the Alaska Juneau for an injunction, the Court said:

“I find that the Tripp notice was the first step taken by any one.”

Record, Vol. I, p. 158.

In its memorandum decision directing a dismissal of the bill, the Court said:

“I think that the Tripp notice was the first step taken by anyone and that those who took that step and their successors have proceeded with due diligence and that they are prior in point of time to the plaintiff.”

Record, Vol. I, p. 159.

This leads us to inquire who Tripp was and what he did. His testimony is in the record, having been called as a witness for the Ebner Company. It is found in Volume II of the Record, pages 507 to 573. We may briefly epitomize his testimony on this branch of the case (*italics are ours*):

In 1908 was employed by F. L. Underwood, President of the California Nevada Copper Company, to look over the whole field between the Alaska Juneau ground and the Dora Group and all the mines along the belt, including Mt. Juneau. The purpose was to determine where the ore

bodies were and ascertain their value and in a general way to size the properties up for a mine. The work continued through 1909 and part of 1910 (p. 510), sampling all the ore bodies that were not pretty well developed, surveyed the ground and made an assay map; had contour lines all around Gold Creek side holes and connected them up with various mineral posts, patented claims and so forth, and gathered data for a large map to cover the whole property (p. 511). The proposition was that he (Underwood) calculated to make a mine there and was preparing the way to work it in a systematic and businesslike manner, and to find the best way to work it. Most of the work was done in 1909. Until the time Bent and his party arrived, which was in the latter part of July, everything was in my possession, practically under my directions, until I received notice from Mr. Bent and papers that practically amounted to the fact that I was no longer in their employ. My remembrance is that I turned over the property on August 3, 1910 (p. 512). I made continuous reports to the parties who employed me. My idea was to open up the property on a different plan and working it on a larger scale than it had been worked theretofore, to find out the best location, most suitable place, to open the mines in a businesslike way, and I examined every place along the line of the creek, had measurements made and mapped, and finally determined on the place at Shady Bend near where the tunnel is now located and run. The place selected by me would be nearer where the 5-stamp mill is (p. 513). I made recommendations to my employers. I kept constant correspondence with Mr. Underwood. I don't remember that I stated anything to Mr. Bent or Mackay at that time who were here. *They chose other locations*

after I got out of the employ of the company. I calculated to run a tunnel from that point that would have the outlet of tunnel located in the proper place for a mill, according to my way of thinking the best place, and the tunnel would have been driven to intercept the Ebner lead in the best place for the general opening up of the Ebner lead (p. 514). . . . I wrote and posted a notice claiming the water right on Gold Creek. (Notice is in evidence, marked Defendant's Exhibit C, Vol. VII, Record, p. 2164, and will be hereafter set forth.) I posted it at the dam where the flume of the Ebner Company took water from Gold Creek. (p. 519). The notice was posted on the opposite side of the dam from the intake of the *new* flume (i. e., on the same side as the intake of the *old* flume). The notice was posted on a timber that was part of the gate or bulkhead at the dam (p. 521). *I did not record the notice.* (Note. It was not recorded until October 25, 1910. Record, Vol. VI, p. 2086.) In locating the tunnel (above referred to) it was the best place that you could get an outlet to the mine that would give sufficient depth to really warrant us in running a tunnel (p. 521); it would give the greatest power for the water and it would be in a place where the climatic conditions, etc., were more favorable, giving a 400-foot head for water. Received a cablegram from Underwood, telling me to commence work immediately on the construction of the flume carrying the water out of Gold Creek, and at that time I went up there, or a day or two afterwards, and located this water, with the expectation to commence work and build a flume and convey the water down along the plans and lines I had in view (p. 522).

Note: The cablegram was later offered in evidence, in connection with his cross-examination.

It was dated June 17, 1910, and read, "You can arrange for putting dam and flume in order immediately. Money required will be supplied Tuesday." The witness then admitted that this referred to the *old* dam and the *old* flume (Rec., p. 555).

The repair work had been done before he received the telegram (p. 523). The witness further explained that he intended to build a new flume on a little different grade on the *south* side of the creek where the old flume was, utilizing the water at the *old* compressor (above the present site of the Alaska Juneau dam), and run a line for a pipe around Cape Horn on the same side of the creek (p. 523). The witness saw that the notice remained posted during the time the Bent party was on the ground (latter part of July or 1st of August, 1910). The notice was conspicuously posted (p. 525), and could be seen from certain parts of the road.

On cross-examination the witness testified in substance as follows:

I was employed by F. L. Underwood. I don't know anything more about the California Copper Company than he was supposed to be the President. I don't even know that. I was working for Mr. Underwood, who, from communications, so far as I ever knew, had an option on the Ebner property, or some kind of an arrangement by which he had that property (p. 535). I was not working for the Ebner Company (p. 537); had nothing to do with them. There was no agreement of employment unless it was with Mr. Underwood and his connection with the Ebner Company (p. 538). On August 3, I had a paper

served on me from Winn & Barton's office to get off the ground and deliver the keys and possession. I sued the California and Nevada Company for my money and it was paid (p. 540).

The witness further testified that he had in mind three millsites which might be available for a large mill—one above the present site of the Alaska Juneau dam on the Lotta claim of the Ebner, the other two below. He had reported on all three of these (p. 552). From the time he went on the property in 1908, until he quit the employ of the California Nevada Copper Company, there was not anything done on the property in the shape of milling ore or active work—no mining operations (p. 555).

Up to the 3rd of August, 1910, the day he left, *no work* had been done under the water notice posted by Tripp in June (p. 562). The notice had been torn down about the last of July (p. 580). The copy was in Tripp's possession until October, 1910, when it was delivered to Judge Winn (p. 580).

There is absolutely nothing in the record showing any relationship, contractual or otherwise, between Underwood or the California Nevada Copper Company and the Ebner Company. There is at best some slight suggestion in the nature of common gossip that either Underwood or the California Nevada Copper Company had an option on the Ebner property, but there is no proof of anything of the kind.

The following deductions are inevitable from Tripp's testimony, which is not contradicted:

1. Underwood employed Tripp to "spy out the land," investigate the properties, and make plans

so that if Underwood might subsequently acquire any rights in the property he might, if he saw fit, adopt the plans. If not, they would possess no vitality.

2. Whatever intentions Tripp may have had, they were entirely personal, speculative, problematical, and dependent on contingencies. They certainly never became adopted or claimed by any overt act until after August 1, 1910, when the Alaska Juneau began its operations. Tripp never intended to do anything under the notice unless (1) his plan had been approved, and (2) he was furnished with money to carry it out.
3. On his leaving the employment of Underwood August 3, he never advised the parties succeeding him of what he had done, nor discussed his plans with them. He retained in his personal custody the only extant copy of the notice until after trouble started between the two companies, and carried away with him his "intentions."
4. Tripp never had any intention of taking the water out on the north side of the creek. His intention was to preserve the *old* flume and utilize it in the later operations.

The record further shows that on April 4, 1912, he sold his so-called water rights to H. W. Hoops (Rec.,

Vol. VI, p. 2262). Hoops sold them to Sidney J. Jennings, March 10, 1913 (Rec., Vol. VI, p. 2267), and not until months after this action was commenced, and on May 21, 1914, did the Ebner Company acquire them from Jennings (Rec., 2271).

The record fails to show that either Hoops or Jennings had anything whatever to do with the Ebner *Company* as a corporation.

When Bent arrived on the ground in July, 1910, he had on his staff Mackay, his superintendent, Wettrick and Hill, his surveyors. Bent was not called as a witness. None of the other men testified to knowing anything about the Tripp notice, or having discussed Tripp's plans with them. Tripp seems to have been summarily discharged, and says he never discussed these matters with his successors. If there is any inference to be indulged in from the manner of his discharge, it is that his administration was not approved by his superiors.

All the movements of Bent, Mackay, Wettrick and Hill looking to the selection of a site to locate a mill indicate an independent investigation as to the merits of different sites, decision not having been reached until August 6, 1910 (Testimony of Mackay, Vol. II, p. 721).

There is another significant circumstance supporting the suggestion that neither the Ebner Company nor Tripp himself ever set up any claims under the so-called appropriation of water by Tripp. On Au-

gust 25, 1910, the Ebner Company commenced a suit against the Alaska Juneau, complaining of the trespass committed by that company by reason of the interference with the waters of Gold Creek flowing through the Ebner property (Rec., Vol. V, p. 1963). On the same day a similar suit was commenced by Tripp (Rec., Vol. VI, p. 2155). In neither suit is there set up any claim to the waters of Gold Creek, either through the Tripp notice or otherwise, other than as riparian owners. Upon this uncontradicted state of facts the trial Court applied the "doctrine of relation" to the Tripp water notice and the Tripp "intentions."

THE TRIPP WATER NOTICE AND ITS VALUE AS A MUNI- MENT OF TITLE.

The notice posted by Tripp on June 20, 1910, was in the words following:

"LOCATION OF WATER.

"Notice is hereby given to all whom it may concern that I, the undersigned, claim 10 thousand miners inches of the water flowing in this creek or any part of 10 thousand miners inches that may be flowing at any season of the year to be conveyed by ditch, flume or pipe along the bank of Gold Creek on the southerly side or to cross the Creek with pipe or flume or both to any place on the property known as the Ebner Mine, or to carry across or farther than the limits of said mine property. This location is made on the

ground this day and is posted at the place known as the Ebner Dam about $1\frac{3}{4}$ miles up from Juneau, Alaska, on Gold Creek.

"Dated this 20th day of June, 1910.

"Locator H. T. TRIPP."

It will be borne in mind that this notice was posted at the old Ebner Dam, at the intake of the old flume,

Testimony of Tripp, Vol. II, p. 555,

the grade of which Tripp had the ^{ex}pectation of using to generate power at the mill when the old air compressor was then installed above the Alaska Juneau damsite (Rec., p. 523).

As heretofore noted, this notice was not recorded until October 25, 1910. There was nothing whatever in this notice to indicate that the water was to be taken out of the creek at any point above the Alaska Juneau Dam. If the paper was constructive notice of anything, it was notice that no change in either the plan^{or} or manner of use was intended. The 15-stamp mill and the new mill building containing the old air compressor was on the Lotta patented claim of the Ebner. At that time the Ebner Company owned nothing below the Lotta claim. "The Ebner Mine," as then known, consisted of the group of patented claims shown on the diagram attached to the decree (Vol. V, p. 2681), commencing with the Lotta and extending northward as far as the Jewel.

Parish Lode No. 2, south of and adjoining the Lotta, was held by the District Court of Alaska in litigation between the same parties to have been a void location, and the area covered by it to have been Government land at the time the Alaska Juneau built its dam, which is on ground covered by the Parish No. 2 claim.

Findings in *Ebner Co. v. Alaska Juneau Co.*,
Vol. I, p. 124;

Conclusions of Law, p. 127;

Decree, p. 128;

Mandate from this Court, p. 128;

See opinion of this Court, 210 Fed., 599.

The Auk Chief Lode was located by Thos. J. McCully in August, 1900 (Rec., Vol. VII, p. 2257). The Taku Queen by the same party, June 27, 1901 (p. 2259). These were conveyed to Tripp December 13, 1909 (p. 2260), by Tripp to Hoops April 4, 1912 (p. 2263), by Hoops to Jennings, March 10, 1913 (p. 2267), and by Jennings to Ebner Company after this suit was commenced—May 21, 1914.

The Cape Horn Lode Claim was not acquired by the Ebner Company until August 3, 1914 (p. 2225). The Cape Horn No. 2 was conveyed by Ebner January 31, 1913 (p. 2282).

Ebner parted with all his interest in the Ebner Company in March, 1908 (Rec., p. 1087), and never operated the property since (p. 1088). He still owned these claims in 1909 (see Letter Tripp to Ebner, Rec.,

p., 2164). None of these claims were ever worked as mines, they were in no sense a part of the "Ebner Mine," giving to the water notice the most liberal construction. Even when work was started on the new Ebner tunnel in 1911, water was still being used through the old flume to operate the old compressor above the Alaska Juneau damsite (p. 705). Even if the Tripp notice is to be considered constructive notice of anything, it certainly imparted no notice that it was the intention of the appropriator to take the water out of the creek and carry it around on the opposite side, presenting a location of the water *below* the point where it was turned back into the stream, after operating the old air compressor on the Lotta claim.

And yet the trial Court held that the mere posting of this notice without recordation was constructive notice of a claim by Tripp to take the water out on the opposite side of the creek, and turn it back below the Alaska Juneau millsite, or below the point where for years it had been turned back after having been used at the old air compressor above the present site of the Alaska Juneau dam.

If under any circumstances the posting of a notice without recording prior to intervening right is to be considered as imparting constructive notice to all the world, it must be that the notice posted must be so clear in its terms as to place and manner of diversion, nature and place of use, as to leave no room

for doubt as to what was intended. The intention must have been immediately present, a definite object must have been in view, and no uncertainties as to place or manner of use if later comers on the same stream are to be affected by it. As we have already pointed out, Tripp, a mere employee of some one other than the Ebner Company, and not shown to be in a legal sense in privity with that company, posts a notice of water appropriation which might be utilized at three different places, at least one of which (the Lotta claim) would not have affected the Alaska Juneau, and then waits for subsequent developments and investigations to determine which of the three projected plans will materialize, Tripp's situation was in itself speculative. The mines would only be worked if they proved valuable, and actual use of the water at any place was dependent on the outcome of a speculative enterprise.

His intentions were analogous to the case where a locator testified:

"My intention was that knowing that a good location was wanted for a smelter site, to hold it for that purpose."

Miles v. Butte Electric & Power Co. (Mont.),
79 Pac., 549, 554.

As was said by the Supreme Court of California:

"Until a claimant is himself in position to use the water, the right to water or water rights does

not exist in such sense that the mere diversion and use of the water by another is ground of action to recover the water or for damages for diversion."

Nevada County and Sac. Canal Co. v. Kidd,
37 Cal., 282, 311.

See also

Kimball v. Gearhart, 12 Cal., 27.

"A declaration of a claim to water, unaccompanied by acts of possession, is wholly inoperative as against those who shall legally proceed to acquire a right to the same."

Columbia Mining Co. v. Holter, 1 Mont., 296,
300.

And as we have heretofore said, Tripp had nothing to do with the Ebner Company, and the Ebner Company had nothing to do with Tripp.

The court found that there were no written rules adopted by the miners, or if they had been, they had fallen into disuse. (Finding X, Record, Vol. VII, p. 2670), and became obsolete before the rights of either of the parties to this action were claimed to be initiated, and that they are inconsistent with the laws of the United States, and could not be in force since the extension of organized government to Alaska in the year 1884. The court finds, however, that there was a custom among the miners to post a notice, and that notice (without recordation) operated as con-

structive notice to all the world, and that Tripp knew of this custom and was governed by it.

Finding IV, Record, Vol. VII, p. 2647.

This leads us to a discussion of the laws in effect in Alaska governing appropriations of water, the extent to which the water is subject to regulation by miner's rules, and what rules, if any, had been adopted and were in force in June, 1910, and thenceforward.

WATER RIGHTS IN ALASKA—MINER'S RULES AND CUSTOMS.

There are no statutory provisions in Alaska prescribing the manner in which water may be appropriated.

Section 16 of the Act of making further provision for the Civil Government of Alaska, June 6, 1900 (31 Stats., 328) appears as Section 175 of the Compiled Laws of Alaska, p. 157.

It provides that

"Miners in any organized mining district may make rules and regulations governing the recording of notices of locations of . . . water rights, flumes and ditches . . . ; and all records heretofore made in good faith in any regularly organized mining district are hereby made public records and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this act."

Section 379, subdivision seventh, of the compiled laws of Alaska, p. 258, requires that the respective

recorders of the various recording districts shall record notices and declarations of water rights.

At the time the act of June 6, 1900, *supra*, was passed, the Harris Mining District was an organized mining district, with specifically defined boundaries. The property here in controversy is situated within that district.

Water appropriations for mining purposes in Alaska are subject to regulation by rules of miners.

4 *Kinney on Irrigation*, Sec. 1708;

1 *Weil on Water Rights*, 3rd Ed., p. 388, note.

The question arises in this case, although, as we view it, not a vitally essential one, as to whether at the time the Tripp notice was posted there was any miners' rule or custom in force on the subject of appropriation.

It appeared in the evidence that as far back as 1882 a set of Miners' Rules governing water rights was adopted by the miners of Harris Mining District.

Record, Vol. V, p. 1973-6.

They were printed by lawyers in Juneau, and circulated in pamphlet form (page 1977 and page 1988).

These rules are shown to have formed a part of the records of the Harris Mining District, being produced by the then U. S. Commissioner for the Juneau Recording District, being in his possession as such official.

Testimony of Marshall, Vol. III, p. 872-876.

John G. Heid was the last District Recorder, and as the miners had elected the U. S. Commissioner as District Recorder to avoid confusion, Heid, pursuant to instructions at a miners' meeting, turned over these records to the Commissioner.

Testimony of Heid, Vol. IV, p. 1467, *et seq.*

These rules contain among others the following requirements:

1. The posting of a notice at the point of intended diversion, specifying the extent claimed in (miner's) inches, measured under a four inch pressure, the purpose for which he claims it, and the place of intended use.
2. A copy as posted must be recorded in ten days.
3. Within twenty days during the working season after notice is posted, work must be commenced.
4. A failure to comply with these rules deprives the claimant of his right to the use of the water.

Record, p. 1984, Vol. V.

The Tripp notice did not comply with these rules. The notice was posted June 20, 1910, and not recorded until October 25th, 1910. No work was done by Tripp at all, and none by those who followed him, until after the Alaska Juneau had commenced work.

A great deal of oral testimony was introduced by both parties on the subject of these rules, the Ebner Company contending that they had fallen into dis-

use, and the Alaska Juneau asserting that they were continuously observed and in force.

The most satisfactory and convincing evidence on this subject was the records themselves, or a condensed table taken from the records, showing what the almost universal custom was, at least as to the contents of the notice and its recordation. These tables, introduced by plaintiff, appear commencing at page 2045, Vol. V. The key to this tabulation is found in Vol. V, p. 2044, and is as follows:

The letter A indicates that the notice designates the place of use.

The letter X, no place of use specified.

The letter B, where time between location and recording is ten days or less.

The letter O, where time between location and recording is more than ten days.

The period covered by the investigation commences June 27, 1881, and ends March 23, 1914. Tabulation of results by years is shown on p. 2092, Vol. VI. The total number of locations shown to have been made during this period was three hundred and eighty-six. Of these two hundred and ninety-three, or seventy-five per cent., were recorded within ten days. Twenty per cent. were recorded after ten days from the date of the notice. Fourteen notices, or three per cent., had no date. Eighty per cent. designated the place of intended use. Nineteen per cent. failed to so designate.

Tables introduced by defendant showed four hundred and fifty-six locations, two hundred and seventy-

four of which were recorded within ten days from date of notice, and thirty-five within ten days from the date of posting, as shown in the notice, making a total of three hundred and nine. Ninety-five were recorded after ten days, computing from date of notice. Thirty-four were not recorded within ten days from date of posting shown in the notice. Eighteen were indeterminable.

Defendant's Tabulation, Vol. VI, p. 2381.

The witness, L. E. Van Winkle, who examined the records and testified for the Ebner Company and made the tabulation, was shown upon cross-examination to have been unfamiliar with the boundaries of the District and to have included in his estimate a substantial number of locations that were obviously improperly included in his estimate.

See

Cross-examination of Van Winkle, Vol. V, p. 1831, *et seq.*

Taking either tabulation, it is evident that by far the larger proportion of all notices of appropriation were recorded within ten days, and to this extent at least the custom is established; in other words, the written miners' rules in this behalf have been followed.

Rules and regulations were proved to have been adopted and acquiesced in; a presumption arises that they continue in force until something appears show-

ing that they have been repealed or have fallen into disuse and another practice has been generally adopted and acquiesced in.

North Monday v. Orient, 1 Fed., 522;
Jupiter M. Co. v. Bodie Cons., 11 Fed., 666;
Riborado v. Quang Pang, 2 Idaho, 131, 6 Pac.,
 125.

The mere violation of a rule by a few persons only would not abrogate it, if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused.

North Monday v. Orient M. Co., 1 Fed., 522.

If the rule requiring recording within ten days, as prescribed by the written rules, was in force and generally recognized, it should logically follow that the penalty for failure to so comply in the presence of a subsequent locator was also in force. Otherwise why should seventy-five per cent. of water appropriators obey the rules and record within the ten days?

The Tripp notice has this further defect. It fails to specify with reasonable certainty the place of intended use.

If we are to assume that there was no local rule or custom on the subject, then the one who first commences work secures the prior right, and in this case it was the Alaska Juneau.

In the case of *Van Dyke v. Midnight Sun*, 177 Fed., 85, 92, this court said:

"Inasmuch as the statutes of Alaska make no provision respecting the necessity of either the posting or recording of notices of appropriation of water upon the public land, we think no such notice essential to the validity of a *bona fide* diversion of such waters for a beneficial use in Alaska."

If this be true and a correct statement of the law applicable to this case, how is it possible to impart to the Tripp posting, *constructive notice*?

The finding of the court on the question of custom is limited to the posting of the notice and the legal attribute of imparting *constructive* notice to all the world. How is it possible for this legal quality to attach to a posted notice by a *custom*, no proof of which is possible? Constructive notice is always a creature of the statute, not of a local custom. If there was no duty or obligation incumbent on Tripp to post the notice, the notice when posted could not operate constructively, unless followed up with development in advance of intervening rights.

The notice itself was torn down in July. It is not suggested that the Alaska Juneau had anything to do with this. It is not contended that the Alaska Juneau ever saw it or knew of the existence of the notice.

If by process of common factoring we eliminate all the water notices of both sides in this case, as not

being required or authorized by law or local custom in Alaska, we come inevitably to the rule announced by Judge Wolverton as being the rule recognized by this court:

“In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but applying the doctrine of relation, fixes it as of the time when he began his dam or ditch or flume or other appliance by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence.

Amalgamated Sugar Company v. Hempe (on rehearing), 226 Fed., 1019.

Tested by this rule, the Alaska Juneau is prior in point of time. It commenced its work on August 1, 1910, and continued incessantly until the diversion was completed.

THE MULLIGAN NOTICE AND RIGHTS OF ALASKA JUNEAU ARISING THEREFROM.

On August 1, 1910, Kinzie, Superintendent of the Alaska Juneau, sent Mulligan to Gold Creek to post a notice of water appropriation in behalf of the Alaska Juneau Gold Mining Company (Record, Vol. I, p. 182). Such a notice was posted by Mulligan (Vol. I, p. 443). This notice was as follows:

“Know all men by these presents: That I, L. D. Mulligan, of Alaska, a citizen of the United States

and over the age of twenty-one years, have appropriated and claimed 20,000 miners' inches of waters of Gold Creek, near Juneau, Alaska, to be used for milling, mining and other purposes.

"Said water to be diverted from said creek at a point indicated by this notice posted on a tree and about one mile from the mouth of said Gold Creek. Said water is to be diverted by ditch, pipe and flume.

"L. D. MULLIGAN.

"Dated, Aug. 1, 1910."

Plaintiff's Exhibit 24, Vol. V, p. 1959.

This notice was recorded August 8, 1910 (p. 1960). On August 2, 1910, Mulligan executed to the Alaska Juneau an assignment of this water right (p. 1960).

This notice was posted at a point a short distance north, 150 feet, of where the Alaska Juneau Dam was subsequently constructed. This point was determined by the District Court of Alaska in litigation between these parties to be on the patented Lotta Claim belonging to the Ebner Company.

There was prior to this determination a great deal of uncertainty as to where the South side line of the Lotta was. The numerous positions which the boundaries of this claim might occupy, applying the different methods, is shown on Defendant's Exhibit B, Vol. VI, p. 2161. If the patent tie calls were given effect, the notice would not have been on the Lotta claim. The same result would have followed if the position of Gold Creek was correctly shown on the official plat accompanying the patent (Defendant's Ex-

hibit T, Vol. VI, Record, p. 2168, p. 2169). The Ebner Company succeeded in establishing the lower side line in the litigation referred to, by establishing the position of the stakes as they were set on the ground. Such stakes as so claimed could not be harmonized with the tie calls, the patent plat or calls for course and distance. It is not proposed to here retry that issue. The most that can be made of it is that a mistake was made owing to the confusion and uncertainty at the time the notice was posted, and that through an inadvertence the precise place where the notice was posted turned out to be on the Lotta patented claim. This, however, is, we think, quite immaterial. No claim of right was asserted to the land on which the notice was posted. The line of the flume and the dam as subsequently constructed was not on any property to which the Ebner Company had any right. The object to be obtained was the water flowing in Gold Creek, at a point below where it was then being turned back into the creek by the Ebner Company. The Ebner Company had no riparian right to the water arising out of its ownership of the Lotta claim.

Van Dyke v. Midnight Sun M. & D. Co., 177
Fed., 85;

See also

State v. Superior Court (Wash.), 126 Pac.,
945, 955.

It will also be borne in mind that the Alaska Juneau commenced active operations on the same day the notice was posted, and thereafter prosecuted its work incessantly, until actual diversion was made. This was of itself sufficient initiation of the right in the absence of any valid prior appropriation. If the Tripp notice possesses no legal value, as we earnestly contend that it does not, there can be no serious question of the priority of the right of the Alaska Juneau.

There were other supplemental and amendatory notices posted and recorded by the respective parties, but as both parties had prior to this time commenced and were actually engaged in prosecuting work, these notices are of no substantial significance.

ERRORS COMPLAINED OF AND ASSIGNED.

With the foregoing presentation of the case and its background, we may take up for consideration the errors relied upon which attack the findings and conclusions of law.

These findings, and the objections to them, appear in Vol. VII of the Record, commencing at page 2642. Findings I and II were not objected to. The others will be considered in order.

FINDING III.

This Finding is as follows:

“That sometime about 1908, and a long time prior to the commencement of this action, the

Ebner Gold Mining Company and its general manager and president, William M. Ebner, concluded to open up the said mining property and mine, mill and treat the ores taken therefrom upon a larger scale than it had theretofore been operating said mines, and to that end and purpose it was concluded to drive a large working tunnel, commencing said tunnel at the lower end of the property upon what is known as Cape Horn No. 2 lode claim belonging to said company, thence driving said tunnel through said group of claims to the upper end of the same to the old workings, which said tunnel would crosscut the formation and show up the values of the property, as well as to serve as a working tunnel. They also concluded upon building and constructing and equipping a large stamp-mill of about 150 or 200 stamps at or near the portal of said crosscut and working tunnel and to build and construct a flume and pipe-line to take from Gold Creek a large quantity of water and convey it from a point at or near where the water had been diverted from the creek in connection with the said 15-stamp mill, which is at the upper end of the group of claims, to a point near the portal of the tunnel and at the place where it was decided to erect the 150 or 200-stamp mill, and to erect such other buildings and install such other machinery so as to carry out the plans decided upon.

"That during the year of 1909 one H. T. Tripp, an experienced mining engineer, was employed by persons interested in said group of mining claims of the Ebner Gold Mining Company to look over, examine and explore said mining property and to report on the advisability of opening up and mining said property on a larger scale, as had been decided on by the said William M. Ebner, and the said Ebner Gold Mining Company.

That said Tripp made a thorough examination of the property, its formation, the ore body or bodies, and the water of Gold Creek flowing there through, and reported favorably on what the said Ebner and Ebner Gold Mining Company had concluded to do. That Tripp completed his work and made his report about the last of June or the first of July, 1910."

This finding is attacked by Assignments of Error Nos. 40, 41, 42 and 43. The exceptions taken to it appear in Vol. IV of the Record, p. 2645.

All of the facts in this finding are wholly irrelevant and immaterial. The vital question in this case is not what the antecedent intentions of either Ebner or the Ebner Company were, as to the future plans for operating the property in 1908. In March of that year Ebner parted with all his interests in the property of the Ebner Company (Rec., Vol. III, p. 1087), and never had anything to do with the property since (p. 1088). Cape Horn Lode Claim No. 2, on which the proposed tunnel was to be built, was not then owned by the Ebner Company. It succeeded to the title on January 31, 1913 (Rec., Vol. VI, p. 2282). Nothing was ever done to disclose the so-called "intention" of Ebner or the Ebner Company. The only move ever made was by Tripp in June, 1910, when he posted the Tripp notice. He is not shown to have known anything about the "intentions" of the Ebner Company. It is positively shown that Tripp had nothing whatever to do with the

Ebner Company. He was employed by a man by the name of Underwood, who was said to be president of the California Nevada Copper Company (Rec., Vol. II, p. 510, *et seq.*).

We have heretofore epitomized Tripp's testimony (see page ³² of this brief), from which it clearly appears that Tripp was acting for somebody who had some vague sort of option on the Ebner stock. Tripp owed no duty to the Ebner. His acts and conduct were in no sense binding on that company. He was not its agent in any sense. The attempt made by this finding is to attach to Tripp's activities the antecedent two-year-old intention of the Ebner to do certain things. He is said by the finding to have been "employed by persons interested in said group of mining claims of the Ebner Company to look over and examine and explore said mining property and to report, etc."

The finding that Tripp was employed by "persons interested" in the Ebner property is not a finding that he was employed by the Ebner Company. A bondholder, a stockholder, a lienholder, or the holder of an option on the stock of a company may be *interested* in the property, but what he does in no sense is attributable to or binding upon the company.

Tripp did not report to the Ebner Company. He reported to Underwood, not what the Ebner Company's "intentions" were, but what he, Tripp, thought was the best thing to do (Rec., Vol. II, p.

513; also ~~ps 31-33~~ of this brief). The process of reasoning by which the Court arrived at this finding must have been about as follows:

In 1908 the Ebner Company had certain ideas how the property should be worked and when a mill should be built. Tripp in 1910 recommended these plans as one of three separate alternative suggestions. Therefore, Tripp's actions must have enured to the benefit of the Ebner Company.

In addition to this the record shows that the Ebner Company had previously erected a mill building on the Lotta claim, in which later an air compressor was installed and excavation made for enlargement of the mill plant. This is the only physical act ever done by the Ebner Company evidencing an intention to erect a mill anywhere.

The finding is not the finding of an ultimate fact. There is no possible legal deduction which can be drawn from it, which is of any legal value whatever.

FINDING IV.

Finding IV is as follows:

"The Court further finds that as early as October, 1880, the miners in and near the vicinity of Juneau and Silver Bow Basin, including the territory covered by the Ebner Company's group of mining claims, diverted and appropriated water from streams to be used for mining and other beneficial purposes and ever since about that date it has been the universal practice and general cus-

tom for any person or corporation desiring to appropriate water for the purposes last above mentioned to post a notice in writing in a conspicuous place at the intended point of diversion on the creek or stream from which the water is expected to be diverted or taken; that the posting of such notice has always been considered under such general custom of miners as the first step taken looking towards the appropriation and applying the water to mining or some other beneficial use as well as showing the intention of the person or corporation posting the notice and giving warning and notice to others of the poster's intention of utilizing such water.

"And the Court further finds that the posting of the notice in the manner above mentioned does serve the purpose above stated. That the said H. T. Tripp knew of the above-mentioned custom, and while examining and exploring the group of mining claims of the said Ebner Gold Mining Company as stated in these Findings, on the 20th day of June, 1910, attached to a board and posted in a conspicuous place on the Ebner Gold Mining Company's dam, which had been constructed for the purpose of diverting the water and conducting it to the 15-stamp mill, a written notice claiming 10,000 miner's inches of water of the said Gold Creek, which said notice is as follows:

" 'NOTICE OF WATER.

" 'Notice is hereby given to all whom it may concern that I the undersigned claim 10 thousand miner's inches of the water flowing in this creek or any part of 10 thousand miner's inches that may be flowing at any season of the year to be conveyed by ditch, flume or pipe along the bank of Gold Creek with pipe or flume or both to any

place on the property known as the Ebner Mine or to carry across or farther than the limits of the said mine property. This location is made on the ground this day and date and is posted at the place known as the Ebner dam about $1\frac{3}{4}$ miles up from Juneau, Alaska, on Gold Creek.

“Dated this 20th day of June, 1910.

“Time—7:30 A. M.

“Locator—H. T. TRIPP.

“Witness: JOHN SOINI.’

“That said notice could be plainly seen from a public highway which runs up Gold Creek and in close proximity to said dam on which said notice was posted. That while said H. T. Tripp signed or affixed his own name to the notice, the said making out of said notice and posting of the same, and said step so taken looking towards the applying of said amount of water to use for mining or other beneficial purposes, was done by the said Tripp on behalf of and for the said group of mining claims of the Ebner Gold Mining Company and parties interested therein, and said water was intended to be conducted down, over and across the said group of mining claims from the point of intake of the said defendant company to the millsite and tunnel portal on the Cape Horn No. 2 claim at the lower end of the Ebner property, and there to be used and applied to the air-compressor and the new mill to be built, and for mining purposes generally, as had been contemplated under the Ebner and Tripp scheme of opening up, mining and operating said property on a larger scale as had been referred to in these Findings.”

This finding is attached by Assignment of Error No. 5. The exceptions taken to it appear in Vol. IV of the Record, p. 2649. What we understand to be the rule governing water appropriations for mining purposes in Alaska is set forth in the subdivision of this brief under the head of "Water Rights in Alaska—Miners' Rules and Customs," ante, p. 41. We have also discussed under the heading "The Water Appropriation by H. T. Tripp and his relation to the Ebner Company," ante, p. 28, Tripp's relation or lack of relation to the Ebner Company, under the heading, "The Tripp Water Notice and its value as a muniment of title," ante, p. 35.

It is unnecessary to here repeat what is there said. We may, however, summarize views discussed under these headings:

1. The testimony shows that the written rules, so far at least as the posting and recording of notices were concerned, were in force. That these rules required notices to be reasonably certain as to their contents, and the Tripp notice had no force as imparting notice constructively, as it was not recorded and was too indefinite as to the place of intended use and method of diversion.
2. Whatever intentions Tripp had in posting the notice were purely personal to him, and had no connection with the Ebner Company.

3. The notice was purely speculative. Tripp's plans involved three alternative places where the water might be used. The notice was purely tentative; the selection of the ultimate place was to be determined by others. Work under the notice was not to be prosecuted unless he was furnished with funds, which never materialized. He was discharged by his employer, and never discussed the matter with those who succeeded him.
4. It is not shown that whatever was done by Tripp's successors was done with a knowledge of Tripp's intentions, or the adoption of such intentions. The place where the mill was to be constructed was not settled until August 6th, and it was then settled after an independent investigation by Bent, Mackey and the surveyors.
5. The record fails to show that any of the parties from Tripp down were ever in any way in such privity with the Ebner Company as would bind that company in anything they did.
6. The record fails to show that the Ebner ever acquired any possible claim of right under the Tripp notice until long after this suit was brought. The record shows no transfer from Tripp to even his own employer, the California Nevada Copper Company, and no relationship

whatever, contractual or otherwise, is shown to exist between that Company and the Ebner Company.

There is a certain part of this finding to which we may call this Court's attention. The finding says (*italics are ours*):

"That while said H. T. Tripp signed or affixed his own name to the notice, the said making of said notice and posting of the same, and said step so taken looking towards the applying of said amount of water to use for mining or other beneficial purposes was done by said Tripp *on behalf of or for the said group of mining claims of the Ebner Gold Mining Company and parties interested therein.* . . ."

We submit that this is not a finding that the Ebner Company did the acts recited. It negatives any such deduction. The Ebner Company had nothing to do with it. One seeking to appropriate water must have a present *intention* and ability to devote it to a specific use at a specific place, not a contingent intention, which others might or might not entertain.

A water notice posted by a party who does not know which of three possible places is to be selected for ultimate use, cannot acquire a right as against intervening appropriators. Such a notice would be speculative in its nature, and should not be given the effect of compelling subsequent appropriators to wait until the first appropriator finds out where he

will conduct the water. We desire further to call the special attention of the Court that the notice set up in the finding is not a copy of the notice posted by Tripp. The original notice states that the water is to be conveyed along the bank of the creek "on the southerly side." The phrase "on the southerly side" was omitted by the Court.

FINDING V.

Finding V is as follows:

"The Court further finds that the action of said Tripp in posting of said notice mentioned in the finding above set forth was the first step taken by anyone looking towards the future diversion and appropriation of the water of Gold Creek, and said action of said Tripp was prior to any step taken by plaintiff, or any intention made manifest by plaintiff, of taking any water from Gold Creek and applying it to mining or other beneficial use, and was prior to the posting of any water location notice by said plaintiff.

"That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was posted, and after actual diversion of the water at such point, did the plaintiff do anything that would give notice to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek."

This Finding is attacked by Assignments of Error Nos. 51, 52, 53.

The exceptions taken to it appear on pages 2655-2659, Vol. VII, of the Record.

V.

This finding is based upon the assumption that there was some legal value to be attached to the Tripp notice, and that the Ebner Company succeeded to Tripp's rights whatever they might be. We think we have clearly demonstrated first that the notice possessed no legal value, and did not operate as constructive notice of anything; that it was purely speculative. We have also shown that the Ebner never acquired any rights such as they may be under the Tripp notice until long after the suit was brought.

The latter part of the finding suggests indirectly, and inferentially, that the Ebner Company did something to give the Tripp notice vitality.

As a matter of fact there is not a line of testimony in the record, written or oral, which shows that the Ebner Company ever did a stroke of work or expended a dollar of money in any activity whatever in connection with the so-called Tripp water location. All the acts done and money spent were done and spent by parties who are not shown to have any such relation to the Ebner Company as to even lead to the inference that the Ebner Company was in any way bound by such acts.

This finding is clearly contrary to the evidence, and is replete with erroneous and illogical inferences.

That part of the finding which decides

"That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was posted, *and after* actual diversion of the water at such point, did plaintiff do anything that would give notice to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek,"

is deserving of special notice.

1. The defendant did *not* post any notice, nor was any posted in its behalf.
2. Defendant did no work whatever.
3. Plaintiff caused the Mulligan notice to be posted on August 1, 1910, and on the same day commenced work *under the notice* and continued until it diverted and used the water. The diversion, so-called, said by the Court to have been made by defendant, but in fact made by the California & Nevada Copper Company, consisted of hurriedly putting in one or two sections of flume at the intake, about Oct. 4 or 5, 1910, and running water through it and turning it back into the creek within a few feet of the dam. No beneficial use of the water was ever made by anybody, *even after the flume line was completed until more than two years* had elapsed, when the new com-

pressor was taken out of storage at Juneau by the California & Nevada Copper Company and installed at Shady Bend.

On August 25, 1910, the Ebner Company commenced suit against the Alaska Juneau sounding in trespass, alleging the very acts and things done by the Alaska Juneau looking to the appropriation of the water, and in the complaint in that action the Ebner Company set up that the Alaska Juneau had ever since July 27, 1910, been engaged in removing timber and clearing up what appears to be a right of way for a flume, ditch or pipe line to convey the waters of Gold Creek, and that if these acts were continued the Alaska Juneau would divert the water of Gold Creek from the Ebner Company.

Plaintiff's Exhibit 26, Complaint of Ebner Company, Record, Vol. V, p. 1963, paragraph VI, p. 1966.

If on August 25, 1910, the Ebner Company could make the acts done by the Alaska Juneau, for the purpose of diverting the water, the ground of a complaint in equity to enjoin the continuance of the acts complained of, the Ebner Company ought not now to be permitted to dispute the facts as alleged by it in the former action.

FINDING VII.

Finding VII is as follows:

"That by certain mesne conveyances said H. T. Tripp a long time before the commencement of this action assigned or conveyed whatever right or title he acquired by reason of posting the notice signed by him, to the defendant, Ebner Gold Mining Company.

"That work was commenced under said Tripp notice and those for whom said water was located and their successors in interest have proceeded with due diligence with their work in the opening up and developing of said mining property and the application of the water of Gold Creek under said notice to actual use. The tunnel mentioned in these findings which had been decided upon to be driven by said Tripp and Ebner was soon after the filing of said notice surveyed out, commencing at the lower end of the said group of claims on Cape Horn No. 2 lode claim, and extending to the upper end of said group of claims to what is known as the old Ebner workings, about the point of the 15-stamp mill, and had been driven at the time of the commencement of this action 2600 feet and taps the ore bodies of said group of claims at various depth, being from the bottom of said tunnel to the surface about — feet. That a right of way was surveyed out for a high line flume which had been decided upon by said Ebner and Tripp, said survey commencing at the point where the Tripp location notice was posted and extending around the hillside across the Ebner property to a point near the portal of the tunnel and the millsite, which said flume is $3\frac{3}{4}$ feet by 4 feet and about 4000 feet long, and has a carrying capacity of approximately 3200 miner's inches of water, and had been completed

at the time of the commencement of this action. Lumber and material were purchased for a 200-stamp mill, and most of the machinery bought to equip said mill, the millsite graded at or near the portal of said tunnel, and at or near the point where the water was to be conveyed. That on the 14th day of September, 1910, water was diverted from Gold Creek at a point where the Tripp notice was posted, said water run through a large open cut made for the purpose of laying the new flume, and this diversion of the water from Gold Creek was prior to any diversion therefrom made by the plaintiff herein. The new flume line above referred to was completed from a point on Gold Creek where the Tripp notice was posted to the penstock of said Company on the 15th day of December, 1910. Work was commenced on the tunnel above referred to on or about the — day of —, 1910, and was diligently and actively kept up, said tunnel being 8 feet by 8 feet, and as above stated had been driven 2600 feet at the time of the commencement of this action, and at the time of filing the answer in this cause there had been over 4000 feet of tunneling, cross-cuts and drifts completed. That before the commencement of this action a large new air-compressor plant had been erected near the mouth of the tunnel and a pipe-line leading from the penstock above mentioned to the air-compressor, and in August, 1913, said pipe-line was connected up with said air-compressor and the water used for power in running the same, and said air-compressor was used in continuing the driving of the new tunnel referred to in *these* finding and has been applied to that use ever since said last mentioned date. Prior to the commencement of this action the lumber and material referred to herein for the building of the 200-stamp mill as well as the machinery for the equipment of the

said mill had been purchased and forwarded to Juneau, Alaska, and most of the same on the millsite near the place of the erection of the new mill. That since the commencement of this action and at the time of the trial of the same, work has progressed on said property with due diligence and from time to time larger quantities of water taken from Gold Creek through the said new flume and applied to use by the defendant company as necessity demanded."

This finding is attacked by Assignments of Error Nos. 54, 55, 56, 57, 58, 59, 60, 61 and 62. The exceptions taken to it appear on pages 2662-2667, Vol. VII of the Record.

The first part of the finding challenges special attention.

"That by certain mesne conveyances said H. T. Tripp a long time before the commencement of this action assigned or conveyed whatever right or title he acquired by reason of posting the notice signed by him, to the defendant, Ebner Gold Mining Company."

This is directly contrary to the facts. The record shows the following transfers by Tripp:

- April 4, 1912. Tripp conveyed to Hoops. Record, Vol. VI, p. 2263.
- March 10, 1913. Hoops conveyed to Jennings. Record, Vol. VI, p. 2267.
- May 21, 1914. Jennings conveyed to the Ebner Company. Record, Vol. VI, p. 2271.

Neither Tripp, Hoops or Jennings are shown to have had any antecedent connection with the work done looking towards a diversion of the water, and it was not until long after the suit was commenced that the Ebner ever connected itself in any way with the Tripp notice.

It will be recalled that Tripp testified he had nothing to do with the Ebner Company (Rec., Vol. II, p. 538); that he never recorded the notice (Vol. II, p. 521); that the notice was torn down in July, 1910 (Vol. II, p. 580); that no work was done under the notice (Vol. II, p. 562); that on August 3, 1910, he was ordered to get off of the ground (Vol. II, p. 540); that he never informed those who succeeded him of the fact that he had made a water location (Vol. II, p. 514), and that he held the title to whatever rights were conferred by the notice until April 4, 1912, when long after there has been a complete diversion of the water by the defendant, he transfers his title to Hoops, a party not shown to have any connection with the Ebner Company, shows to our mind quite clearly that the Court below was not justified in making this finding.

It hardly requires the citation of authorities to show that a water right is an incorporeal hereditament, in fact is real property and must be conveyed by deed. We append a few cases, however.

Rickey Land & Cattle Co. v. Miller & Lux,
152 Fed., 11;

Travelers' Ins. Co. v. Childs, 54 Pac. (Colo.),
1020;

Kinney on Irrigation and Water Rights, 2nd
Ed., §769;

First National Bank v. Hastings, 42 Pac.
(Colo.), 691;

Monte Vista Canal Co. v. Ditch Co., 123
Pac. (Colo.), 831;

Smith v. Denniff, 60 Pac. (Mont.), 398.

Contracts in relation to water rights are within the statute of frauds.

Hayes v. Fine, 91 Cal., 391, and cases cited.

If the Ebner Company claimed anything under Tripp at the time the suit was commenced, it was required to show by at least some evidence,—a contract, or trust relationship. Not only is no such thing even hinted at in the testimony, but it is affirmatively shown that Tripp had nothing to do with the Ebner Company. Nor did his employer, the California Nevada Copper Company.

As to the remainder of the finding, it is all predicated on some value being attributed to Tripp's notice and to the acts done by the California Nevada Copper Company. Whatever was done, it was not done by or for the Ebner Company.

The construction of the new Ebner flume carried the water down to a proposed millsite, *and for a period of over two years was not used for any pur-*

pose whatever. Power to run the tunnel was during this time obtained from the old air compressor on the Lotta Claim, and the rights of the Alaska Juneau were not interfered with. The lumber for the 200-stamp mill was ordered in July, 1910, before any site was selected. It was not ordered for any particular millsite. When any of it was moved on to the mill-site is not shown. Some of it was on the site at the time of the trial (in June, 1914), but from 1910 until that date no use was ever made of it.

In this finding the Court finds that the capacity of the new Ebner flume is 3200 inches, and yet the decree awards 10,000 inches, the amount named in the Tripp notice.

None of the activities set forth in this finding were done by the Ebner Company. When a party goes into possession of property under an option, and makes excavations and builds structures, these may enure by gravity to the benefit of the property. But this does not commit or bind the owner of the property to any of the plans or intentions of the optionee.

FINDING IX.

Finding IX is as follows:

“That the tunnel being driven by the defendant, the Ebner Gold Mining Company, referred to in these findings, is being driven through the group of Ebner lode mining claims, known as the Ebner mine, being the group of lode mining claims for the benefit of which said water was located by

said Tripp, as aforesaid, and all of the work in connection with the development and opening up of the ore bodies in said group of claims since the location of said water by said Tripp has been done with diligence, and \$351,000.00, more or less, expended in opening up such ore bodies in said Ebner group of lode mining claims, and the work was at the time of the trial still progressing with diligence. That all of said work was being done for the purpose of opening up the Ebner group of lode mining claims as a mine so that the bodies of ore within the exterior boundary lines of said group of claims could be opened up and mined, and the ores milled and treated, and the precious metals extracted therefrom."

This Finding is attacked by Assignments of Error Nos. 63, 64 and 65. The exceptions taken to it appear in Vol. VII, pages 2668-2670.

The evidence shows that the tunnel is being run, not by the Ebner Company, but by the United States Mining Company, under some sort of an option from the "Chapman Committee." All the expenditures made were by the United States Mining Company under some kind of an option, the nature of which is not disclosed. It would seem that the Ebner property has been foreclosed and sold, it has ceased to have any interest therein, and the "Chapman Committee" were then in the saddle—for what purpose is not disclosed (Testimony of Muir, Vol. III of the Record).

FINDING X.

Finding X is as follows:

“With reference to the rules and regulations which plaintiff sets out in its reply and claims were adopted by the miners of Harris Mining District in 1882, covering and governing the appropriation and diversion of water from streams for mining and other beneficial uses, the Court finds, after careful consideration of the evidence and the law relating to such rules and regulations, that they never were followed by the miners and were never put in force, or, if they ever were followed or put in force, they fell into disuse and became obsolete before the rights of either of the parties to this action were claimed to be initiated, and that they are inconsistent with the general laws of the United States and could not be in force since the extension of organized government to Alaska in the year 1884, and are therefore of no effect in the determination of the issues in this case.”

This Finding is attacked by Assignments of Error Nos. 66, 67, 68, 69. The exceptions taken to it appear in Vol. VII, pages 2671-2673, of Vol. VII of the Record.

We have heretofore under the title “Water Rights in Alaska—Miners’ Rules and Customs” (ante, p. 41), discussed the subject involved in this Finding.

We may add to what is there said a few suggestions. The finding is in the alternative. Either the rules were never adopted, or if they were, they had become obsolete, or if they were not obsolete, they were after

1884 in conflict with the general laws of the United States. Without commenting on the perplexity arising from this method of making a finding, we suggest in addition to what we have heretofore said on the subject of these rules, that the last alternative, i. e., conflict with Federal laws, is not the finding of an ultimate fact. It is simply a statement of a legal conclusion which is wholly unwarranted.

FINDING XI,

Finding XI is as follows:

“The Court further finds that the work of diversion, appropriation and application of the water from Gold Creek by the defendants herein was prosecuted to completion with reasonable diligence from the time of the inception of said right.”

This Finding is attacked by Assignment of Error No. 70. The exceptions taken to it appear in Vol. VII of the Record, pages 2673-2674.

The vice of this finding lies in the assumption that the Ebner Company ever did anything either by way of appropriation or diversion or use, subjects which we have fully discussed in all their lights and shadows.

CONCLUSIONS OF LAW.

The Conclusions of Law are three in number and are as follows:

I.

"That as against the plaintiff, the defendant is the owner of and entitled to the first use of 10,000 miner's inches of water, to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted."

II.

"That whatever rights plaintiff has in the water of Gold Creek by reason of anything set forth in its complaint, is subsequent, inferior and subordinate to the rights of the defendant, as set forth in these Findings."

III.

"That the plaintiff is not entitled to the relief asked for or to any relief."

These Conclusions of Law are attacked by Assignments of Error Nos. 71, 72 and 73. The exceptions to them are found on pages 2674-2676, Vol. VII of the Record.

The first Conclusion of Law is obviously error. The capacity of the new Ebner flume is admittedly only 3200 miner's inches (Finding VII). The Tripp notice and the Court's erroneous treatment of it is responsible for troubles enough without it being utilized

as a basis for awarding the Ebner Company 6800 miner's inches of water more than the new flume could possibly carry. This of itself is sufficient to require a reversal. But if our analysis of the facts shown by the record is correct, and we respectfully submit that it is, the deductions therefrom embodied in the Conclusions of Law are obviously erroneous.

We respectfully submit that the decree should be reversed with directions to the Court below to enter a decree in favor of the Alaska Juneau as prayed for in the complaint.

J. A. HELLENTHAL,
CURTIS H. LINDLEY,
Attorneys for Plaintiff in Error.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY
(a corporation),

Appellant,

vs.

EBNER GOLD MINING COMPANY (a corporation), THE ALASKA-EBNER GOLD MINES COMPANY (a corporation), ANGUS MACKAY, as receiver for THE ALASKA-EBNER GOLD MINES COMPANY (a corporation), and DOWNIE D. MUIR,

Appellees.

No. 2795

BRIEF OF APPELLEE, EBNER GOLD MINING COMPANY.

JOHN R. WINN,

ALFRED SUTRO,

Attorneys for Appellee,

Ebner Gold Mining Company.

WINN & BURTON,

PILLSBURY, MADISON & SUTRO,

A. D. PLAW,

Of Counsel.

Filed

DEC 13 1916

F. D. Monckton,

Clerk.

Filed this.....*day of December, 1916.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

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IN THE
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vs.

Appellant,

EBNER GOLD MINING COMPANY (a corporation), THE ALASKA-EBNER GOLD MINES COMPANY (a corporation), ANGUS MACKAY, as receiver for THE ALASKA-EBNER GOLD MINES COMPANY (a corporation), and DOWNIE D. MUIR,

Appellees.

No. 2795

BRIEF OF APPELLEE, EBNER GOLD MINING COMPANY.

Statement of the Case.

This suit was brought in the District Court of the District of Alaska, at Juneau, by the above named appellant against the above named appellees to enjoin them from the use of certain waters of Gold Creek, a mountainous stream near Juneau, Alaska (Tr. Vol. I, p. 20).

The trial resulted in a decree dismissing the complaint and adjudging that the appellee, Ebner Gold

Mining Company, was entitled to the first and paramount use of the water of Gold Creek, to the extent of 10,000 miners' inches (Tr. Vol. VII, p. 2679). The appeal is from this decree (Tr. Vol. VII, p. 2740).

It appeared upon the trial, and the court found, that the Ebner Gold Mining Company, one of the above mentioned appellees, is the real party in interest, and we will, throughout this brief, refer to that company as the appellee.

THE FACTS.

The record in this case is very long; it consists of 2746 pages, contained in seven volumes. From the very nature of the appeal a discussion of the evidence by the appellee is necessary. To a considerable extent the same is conflicting and, as we will hereafter point out, the cause being one of equitable cognizance, the findings of the trial judge, unless founded in obvious error, will, therefore, not be disturbed.

A large part of our discussion of the evidence concerns the property of the appellee, and in the course of this discussion we make frequent reference to a map filed by the appellee upon the trial of the cause and known as defendant's exhibit "S". This map was also used by Mr. Winn at the oral argument in this court. A reduced photographic copy of it is in Volume VI of the record, at page 2167. We have, however, for the convenience of the court in following the argument, caused a number of extra copies of it to be made and have filed the same with this brief.

In presenting the case on behalf of the appellee we have divided the entire subject matter into a number of separate parts, as shown in the table of contents at the beginning of this brief. Under each part we have tried to group the facts material to the particular questions therein under consideration. This, we believe, not only makes for a clearer presentation of the case on behalf of the appellee, but will also, by enabling the court to omit from consideration such matters as it does not deem necessary to be considered, lighten the labors of the court in the determination of this appeal.

The facts in the case are clearly and concisely stated in the findings of the trial court. As these findings are presented in the record, however, it is somewhat difficult to follow them, inasmuch as the exceptions and objections of the appellant to each finding are made a part of the same (Tr. Vol. VII, pages 2642 to 2676). We have, therefore, had a copy of the findings made, without the objections and exceptions of the appellant, and have attached the same to this brief as an appendix.

The material facts necessary for a consideration of the questions involved may, we think, be concisely stated as follows:

For a long time prior to the commencement of this action, and at the time of the trial thereof, the appellee was the owner of a large number of contiguous quartz mining claims and mill sites in Silver Bow Basin, near Juneau, Alaska. These mining claims carry gold of great value, in the form of low grade milling ore. The upper end of the claims lies in the mountains and the

mill sites are in the valley below. Gold Creek flows over and across this group of claims; it commences at the upper end thereof, and then, in its course, winds its way down through the mill sites (Finding I, Tr. Vol. VII, p. 2642).

The appellee claims the right to use 10,000 miners' inches of water from Gold Creek, by reason of prior appropriation and use thereof. This claim is based, among other things, upon a notice of appropriation, or location of water, posted on June 20, 1910, by one H. T. Tripp, on what is known as the Ebner dam on the Golden Fleece, one of the patented claims of appellee, and in October thereafter recorded with the recorder of Juneau, and also upon another notice, posted on the same dam, but on the opposite side of the creek from that on which Tripp's notice was posted, by John R. Winn, as agent and attorney for appellee, on the 17th day of August, 1910, and recorded on the same day; upon the prosecution, with diligence, to completion, of the work commenced by appellee for the diversion of the water, and, finally, upon the application by appellee of the water to actual use for mining purposes on its property. It may here be noted that, after its use by appellee, the water is returned to Gold Creek (see appellee's answer, Tr. Vol. I, p. 27).

At the time that Tripp posted his notice, he was in the employ of one F. L. Underwood. This employment began some time in 1908. Underwood was at that time the owner of nearly all of the capital stock of the appellee. Tripp was employed to go upon the property of the appellee to examine the same, and to ascer-

tain the most practical way of opening up and developing it, and of working and mining it on a larger scale than it had theretofore been worked and mined. Prior to that time, and from 1895 to 1908, one William M. Ebner had mined and milled the ore taken from the property at the upper end of it; part of the time he used a 10-stamp mill and the rest of the time a 15-stamp mill. During all of this time, Ebner was President and General Manager of the appellee, as well as the owner of most of the shares of its capital stock. In 1908 he sold all of his stock to Underwood, and it was then that Underwood employed Tripp.

Tripp proceeded with his work until some time about the 1st of August, 1910. During the latter part of his work, he was in the employ of the California-Nevada Copper Company, which had, in the meantime, become the owner of all of the shares of the capital stock of appellee. Everything that Tripp did was for the appellee and for its benefit. During his employment, Tripp made such examinations and explorations of the property as satisfied him of the plans, according to which the property should thereafter be mined, and these plans were also satisfactory to the appellee. The plans of Tripp were that something like a 200-stamp mill should be built at the lower end of the property near Shady Bend, on what is referred to as Cape Horn No. 2 lode claim, or Cape Horn mill site; that a tunnel should be commenced, near where the mill should be built, and, after crosscutting the formation of appellee's property, should be driven to the old workings at the upper end of the property, where Ebner had been mining. Water,

in addition to that which Ebner had been using, was to be taken from Gold Creek. The old Ebner dam, on the Golden Fleece claim of appellee, where Tripp posted his notice, would be the proper place for the intake of the flume or ditch; thence the water would be conveyed down the southerly bank of Gold Creek, and across the creek to the point where Tripp had concluded to build the mill and to commence the driving of the tunnel.

In July, 1910, one George Bent came to Juneau, representing Underwood and the California-Nevada Copper Company, the name of which was thereafter changed to The Alaska-Ebner Gold Mines Company. Tripp, at that time, had left the service of Underwood and the California-Nevada Copper Company, and Bent, as representative and manager of the California-Nevada Copper Company, and as representative of Underwood—Underwood and the copper company at that time owning all, or about all, of the shares of the capital stock of the appellee—took charge of the work, which had been commenced by Tripp, to carry out the latter's plans for the use of 10,000 miners' inches of the water of Gold Creek.

Bent remained in charge of the work for only a short time. About the time that he took charge, one Mackay was employed by Underwood in New York, representing the appellee, to take charge of the property and to select machinery for a 200-stamp mill, as had been recommended by Tripp. Mackay was instructed by Underwood, after he had selected the machinery, to proceed to Seattle, Washington, and to get out the timbers, lumber and material for the 200-stamp mill.

Mackay arrived in Seattle in July, 1910, and commenced the work of getting out the timbers, lumber and material for the mill. About this time Bent wired Mackay to come to Juneau and Mackay arrived there the latter part of July, 1910.

Prior to Mackay's arrival in Juneau, Bent had employed a firm of surveyors, Hill & Wettrick, to go upon the appellee's property and to establish the grade for a flume line to conduct the water from the Ebner dam, where Tripp had posted his notice, to Shady Bend, where he had planned to build the 200-stamp mill and commence the working tunnel. The water was to be used at that place for all general purposes in mining the property and milling the ore taken therefrom, as well as for generating power for driving the tunnel, and for any other necessary purposes in connection with the opening up and working of the property on a larger scale. The surveyors commenced surveying out a flume line and established a grade on the opposite side of the creek from where Tripp had concluded to take the water; but the water was to be conveyed to the same place to which Tripp had intended to take it. Ebner had decided on this method of carrying the water from the dam around to Shady Bend, before he had sold out to Underwood, and Bent and his party had knowledge of this fact.

On August 17, 1910, the appellee, by its attorney and agent, John R. Winn, posted and recorded a second notice of location and appropriation of the water of Gold Creek. This notice was also posted on the Ebner dam—the same dam on which Tripp had posted his

notice—but on the opposite side of the creek. The water was thereafter diverted by appellee from the point at which this notice was posted.

Mackay, after remaining in Juneau at Bent's request until along about the 8th or 10th of August, 1910, returned to Seattle and continued the preparation of the lumber and materials for the 200-stamp mill to be erected on appellee's property. While Mackay was in Seattle, Bent continued the work, which had been commenced on appellee's property, for opening it up and mining it on a larger scale. Mackay, some time in September, 1910, returned to Juneau, and was employed by Bent, acting for Underwood and the California-Nevada Copper Company, as the holders of practically all of the shares of the capital stock of appellee. Mackay assumed the general superintendency of all the work to be conducted on appellee's property, except the establishing of the grade line for the flume, which was left to the surveyors, Hill & Wettrick. At the time of Mackay's return, work was progressing on the flume line. Hill & Wettrick were clearing the right of way and establishing the grade. Mackay proceeded with the construction of the flume and about October or November, 1910, had it completed. He commenced at the Ebner dam, going down the right bank of Gold Creek to Shady Bend, where the mill was to be constructed, the distance being about 4,000 feet. Some time prior to September 14th, 1910, in addition to the other work, which the parties representing appellee had done, looking towards carrying out the Tripp project, as modified by Mackay, an excavation had been made at the old Ebner dam for a

flume, and an opening made in the flume and a temporary headgate placed therein, and the water diverted through this ditch, all of which was prior in time to any physical demonstration or work by appellant looking towards the appropriation of the water of Gold Creek.

Mackay commenced driving the large working tunnel in December, 1910, and continued the driving thereof and other work upon the property of appellee until 1913. Early in May or June, 1913, he erected a new air compressor, at Shady Bend, on Cape Horn No. 2 claim, where it had been determined by Tripp and those who followed him to build the mill. In August of the same year he applied the water of Gold Creek, which was conducted through the new flume to the new air compressor which had been constructed, and he used the power so generated for extending the tunnel, which, at that time, had been driven over 1,173 feet.

About June, 1913, one Downie D. Muir, who represented the United States Smelting, Refining & Mining Exploration Company, which at that time held an option to purchase all of the shares of the capital stock of the appellee, and which it has since exercised, joined with Mackay and continued the work of carrying out these plans for working the property of appellee on a larger scale. Inasmuch as the company, which Muir represented, had an option on all of the shares of the capital stock of the appellee, all of the work which he did, as well as that which was done by Mackay, was for the appellee and for its benefit. The work was at all times prosecuted with diligence, and was being

prosecuted with diligence at the time of the trial of this case.

It appears from the evidence, and is admitted by the appellant (Brief p. 50), that the rights asserted by it are based upon the so-called "Mulligan notice", which was posted upon the "Lotta" patented claim, which, concededly, was the property of appellee.

Argument.

Seventy-four errors are assigned (Tr. Vol. VII, pp. 2686-2737); appellant has, however, abandoned the first thirty-nine (Brief of Appellant, p. 24).

1. THE EVIDENCE WAS CONFLICTING. THE FINDINGS WILL, THEREFORE, NOT BE DISTURBED UNLESS THERE WAS GROSS ERROR.

A mere glance at the transcript of record shows that a great mass of evidence, documentary and oral, was introduced upon the trial of this case, and to a large extent it was conflicting. Under a well settled rule of appellate practice in equity cases, the findings of the trial court will under these circumstances, therefore, not be disturbed, unless founded upon an entirely mistaken application of the evidence, or based upon a gross misapprehension of the facts.

See,

Tilghman v. Proctor, 125 U. S. 136;

Kimberly v. Arms, 129 U. S. 512;

Turner v. Ferris, 145 U. S. 132;

Silver King Coalition Mines Co. v. Silver King C. M. Co., 204 Fed. 166, 177;

The Prinz Eitel Friedrich, 206 Fed. 898;

Arctic Lumber Co. v. Borden, 211 Fed. 50, 52;

Parker v. Ross, 234 Fed. 289;

Luten v. Sharp, 234 Fed. 880, 881.

The language of the Circuit Court of Appeals for the Second Circuit, in the case of *De Laski, etc., Tire Co., et al., v. United States Tire Co.*, decided May 24, 1916, and reported in Volume 235 Fed., page 290, is peculiarly applicable here. The court there said, at page 292:

“This, however, is a litigation aptly suggesting the truth that, while an appeal in equity brings up all the facts for review, there must come a time when the suitors’ right to new investigations of complicated occurrences is properly limited to the indication of palpable error, and does not extend to discussion of matters about which all experience shows careful men may justly differ.”

2. THE CONTENTIONS OF APPELLEE.

It is the contention of appellee that the facts in the case show, *first*, a valid appropriation on its behalf of 10,000 miners’ inches of the water of Gold Creek; *second*, the commencement and diligent prosecution of the work for the use of the water and the prior right of appellee to the same, as against the appellant; and, *third*, that appellant has established no right whatsoever to any of the waters of Gold Creek.

3. THE CONTENTIONS OF APPELLANT.

The main points which the appellant urges for a reversal of the decree, as we understand them, are, *first*, that there was no privity between Tripp and the appellee and that, therefore, the appropriation of the water of Gold Creek by Tripp did not inure to the benefit of the appellee; *second*, that the appellee was not the owner of all of the mining ground necessary for the plan and scheme of mining operations for which Tripp had appropriated the water of Gold Creek, and, *third*, that the Tripp notice of appropriation was, in any event, ineffective, because it did not comply with the provisions of the so-called miners' rules and regulations of the Harris Mining District. There are, besides, some minor points, to which we shall advert in the course of our argument.

For the sake of the orderly presentation of the case on behalf of appellee, it will better serve its purpose to first show the mining properties owned by it at the time Tripp posted his notice, then to show that Tripp, in posting his notice, acted for it, and then to consider the validity and sufficiency of the notices of appropriation, and, finally, to show that, irrespective of the rights of appellee to the water, the appellant, which instituted this action, has no standing in court, because the evidence shows that its claim to the water of Gold Creek is based upon a trespass, and that it, consequently, has no valid basis upon which to predicate its suit.

FIRST.

AT THE TIME OF THE POSTING OF THE TRIPP AND WINN NOTICES OF APPROPRIATION, APPELLEE WAS THE OWNER OF THE FOLLOWING PATENTED CLAIMS: LOTTA, TAKU, KEYSTONE, GOLDEN FLEECE, GRAND REVIEW, JEWEL AND CROWN POINT AND OF THE UNPATENTED CLAIMS: PARISH NO. 1, CAPE HORN AND EUREKA; AND OF THE CAPE HORN AND EUREKA MILL SITES, THE CAPE HORN MILL SITE BEING SAME AS CAPE HORN NO. 2 CLAIM.

In an endeavor to show that the Tripp notice did not contemplate the diversion of the waters of Gold Creek to the mill site of the appellee upon which its mill was to be erected, appellant contends that the appellee was not the owner of this mill site. It claims that the Cape Horn lode and the Cape Horn mill site, afterwards known as the Cape Horn No. 2 lode, were located by William M. Ebner for himself and his co-locators, and that he was the owner of the same. The evidence shows, however, that although Ebner individually located these claims, he was president of the appellee at the time of their location, and that he located the same for the appellee and afterwards conveyed them to it. For a more complete understanding of the situation we will briefly call attention to the evidence showing the properties at that time in the ownership of the appellee.

Finding of Fact No. II made by the trial court is unchallenged (Tr. Vol. VII, p. 2642), and the following facts must, therefore, be regarded as established:

The appellee was for a long time prior to the commencement of this action and at the time of the trial of the same the owner of a large number of contiguous quartz mining claims and mill sites in Silver Bow Basin near Juneau, Alaska. These

mining claims carried and contained gold in great values in the form of a low grade milling ore. The upper claims lie high up in the mountains and the mill sites in the valley below. Gold Creek flows over and across this group of lode claims, commencing at the upper end thereof, and winding its way down to the mill site of the Ebner Company.

William M. Ebner operated this property, mined and milled the ore taken therefrom, from 1895 to 1907 (Tr. Vol. III, p. 1083). When he began to operate the property, it was composed of the following patented lode claims: Taku, Keystone, Golden Fleece, and Grand Review, Jewel, and Crown Point. They constitute the patented mining claims of the appellee (Tr. Vol. III, p. 1092). But Ebner, while president and general manager, and the owner of the majority of the shares of the capital stock of the appellee, with a view to operating the appellee's property on a larger scale, located other mining claims and mill sites, which he afterwards conveyed to the appellee. Among the mining claims so located were the Parish Nos. 1 and 2, conveyed to the appellee October 24, 1899 (Tr. Vol. VI, pp. 2291, 2293), and the Cape Horn and Eureka (Tr. Vol. III, p. 1093). (It may here be noted, however, that the Parish No. 2 claim was determined in a suit between the parties to this suit, to have been a void location and the land covered thereby to be public land. See 210 Fed. 599.)

Ebner stated, in referring to these locations, that "they were all made with a view of being turned into the Ebner Gold Mining Company" (Tr. Vol. III, p. 1094). Ebner being a majority stockholder in the appellee, and these locations having been made for its

benefit, it is, we believe, not open to dispute that all of them inured to its benefit when they were made, and even before any formal transfer thereof to the appellee. Hereinafter, in subdivision "Fourth" of this brief, we have cited some of the authorities to which we ask the court's attention in support of this proposition.

Among the mill sites which Ebner located for the appellee, and under the same circumstances under which he located the above lode claims, was the Cape Horn mill site (Tr. Vol. III, p. 1094). (This mill site is known also as Cape Horn No. 2 lode claim, and covers the same surface ground as the Cape Horn No. 2.) Concerning this mill site, Ebner testified as follows:

"At the time I located that"—referring to the mill site—"for myself, but with the intent—my principal purpose was to use it in the near future for the Ebner Gold Mining Company (appellee) as a mill site" (Tr. Vol. III, p. 1095).

He further said in substance that:

The Cape Horn mill site covered practically the same ground as was thereafter embraced within what is known as the Cape Horn No. 2 lode claim, as indicated on appellees' exhibit "S" (Tr. Vol. III, p. 1095).

When Ebner first commenced mining this property, he used a 10-stamp mill, and this he later increased to a 15-stamp mill. This mill was located on the patented Taku claim (Tr. Vol. III, p. 1083; exhibit "S"). The water used to generate the power for running the mill and milling the ore was taken out of Gold Creek at the Ebner dam, built on the Golden Fleece lode claim of appellee. For some time the water was applied for

generating the power for running the mill, and for milling purposes, and was taken out of the flume at a pen-stock on the hillside, immediately above the mill on the Lotta claim.

Subsequently, Ebner discovered that he did not have sufficient head of water at the mill and he concluded to go down the creek in the canyon and to erect on the patented Lotta claim another building for an air compressor and stamp mill (sometimes referred to by appellant as the "New Mill"); but, Ebner installed no machinery in this building, except an air compressor and electric light plant, which he used in connection with the 15-stamp mill.

Ebner stated with reference to this matter, substantially:

That this air compressor down in the canyon was built in 1897, and I intended to put in a 40-stamp mill there and an air compressor for the purpose of getting power at the old mill; that I could not get power enough with a 110-foot head, which I had in applying the water to the old mill, and couldn't operate the compressor or the 15-stamp mill or even the 10-stamp mill when the water got low in Gold Creek.

He expected that when he had installed his 40 stamps in this mill he would bring his pipe line over to Shady Bend, on the Cape Horn claim, and start a working tunnel on practically the same lines as the one now there (Tr. Vol. III, p. 1096).

Some time in the year of 1906, Ebner employed a surveyor by the name of Hill, and had a survey made for a tunnel site, and, he stated, that while it might not be

precisely on the same line on which the tunnel was afterwards run by Mackay, still the opening was on the same spot. Ebner planned to take the water to Shady Bend, on the Cape Horn mill site, or Cape Horn No. 2 claim, through a pipe line running through the tunnel which he intended to drive (Tr. Vol. III, pp. 1098-9). And, in this connection, he stated that his intentions were the same as those of the appellee, inasmuch as he held the control of the capital stock of the appellee and conducted its affairs and was, in effect, the appellee itself.

In 1900, Ebner abandoned the idea of building a mill where he had installed the new air compressor, on the Lotta claim in the canyon, and fully adopted the plan of opening up and working the property on a larger scale, by building a mill at Shady Bend on the Cape Horn mill site, afterwards known as Cape Horn No. 2, at the same point where Mackay graded off and excavated for a mill (Tr. Vol. III, pp. 1111-12).

Respecting the Cape Horn and Eureka lode claims, Ebner at first had some partners in these two locations (Tr. Vol. III, p. 1116), but he afterwards purchased their interests (Tr. Vol. III, p. 1126). The conveyances from Ebner's co-owners to him and from him to the appellee are set forth in the record (Tr. Vol. VI, pp. 2225, 2234, 2237).

In 1908, Ebner sold out his interest in the appellee to F. L. Underwood (Tr. Vol. III, pp. 1086-87-88).

Ebner further stated, in regard to the Cape Horn and Eureka lode claims, that "when I sold my stock in Ebner Gold Mining Company to Underwood, I conveyed the

Cape Horn and Eureka lode claims by deed to F. L. Underwood; that these claims were especially reserved for appellee". And in this connection, he testified further (Tr. Vol. III, p. 1126):

"The Cape Horn No. 2 (meaning the lode claim) was originally located as a mill site. In 1908, I had sold my stock in the Ebner Gold Mining Company and deeded the Cape Horn and Eureka (meaning the lode claims) and the Cape Horn and Eureka mill sites to F. L. Underwood. After surveying the Cape Horn lode I found outside of the Cape Horn lode property was a ledge, and I didn't know it was outside of the Cape Horn; therefore I located the Cape Horn No. 2 as a lode claim and located it in my own name, all the time expecting to have it conveyed to Mr. Underwood or whoever the proper parties might be who were in possession of the Ebner Gold Mining Company" (Tr. Vol. III, p. 1126).

Tripp was present when the location of the Cape Horn No. 2 lode claim was made and immediately notified Underwood (Tr. Vol. II, p. 524).

Appellant lays some stress upon the point that the Cape Horn No. 2 lode claim, which is the same as the Cape Horn mill site, was conveyed by Ebner to one Martin. Ebner stated in reference to this as follows:

"When I made the conveyance to Mr. Martin, I had understood that Mr. Underwood was out and that Mr. Martin was the true representative of the Ebner Company controlling the Ebner mine—Alaska-Ebner—or whatever that might be; I don't know just what they call themselves. I had every reason to believe that Martin was the proper man to receive that deed and I conveyed that for a consideration of \$100. That consisted mostly of the surveying—I had that all surveyed in 1908 and Mr.

Underwood had never paid me for the surveying, and the location notices, together with other matters, and the survey amounted to about \$100, and I charged him that nominal sum in order not to be out anything that I paid on it" (Tr. Vol. III, p. 1127).

It thus appears that, in 1908, the property of appellee consisted of the Lotta, Taku, Keystone, Golden Fleece, Grand Review, Jewel and Crown Point patented claims, and the Parish No. 1, Cape Horn and Eureka unpatented claims, and the Cape Horn and Eureka mill sites; the Cape Horn No. 2 lode claim being the same as Cape Horn mill site. There is, therefore, no warrant, we submit, for the assertion by appellant that appellee was not the owner of the mill site, upon which the mill was to be erected, and to which the water was to be diverted, under the Tripp notice.

SECOND.

THE POSTING OF THE TRIPP NOTICE INITIATED THE RIGHT OF APPELLEE TO DIVERT THE WATERS OF GOLD CREEK TO THE CAPE HORN MILL SITE.

Appellant, under the title, "THE TRIPP WATER NOTICE AND ITS VALUE AS A MUNIMENT OF TITLE", says, on page 36 of its brief:

"It will be borne in mind that this notice was posted at the old Ebner dam at the intake of the old flume. * * * * *

There was nothing whatever in the notice to indicate that the water was to be taken out of the creek at any point above the Alaska-Juneau dam. If the paper was constructive notice of anything

it was notice that no change in either the place or manner of use was intended. * * * * *

The 'Ebner Mine' as then known consisted of the group of patented claims shown on the diagram attached to the decree, commencing with the 'Lotta' and extending northward."

Our reply to these statements is contained in the three following subdivisions, under this heading of our argument.

1. **The notice was sufficient to give notice of an intention to appropriate the water for the purposes now claimed by appellee.**

It is true that the Tripp notice was posted on the Ebner dam, but how near the intake of the old flume, we think the evidence does not disclose. The notice itself, however, among other things, states that Tripp

"claimed 10,000 miners' inches of water flowing in this creek, or any part of 10,000 miners' inches that may be flowing at any season of the year, to be conveyed by ditch, flume or pipe along the bank of Gold Creek on the southerly *side or to cross the creek with pipe or flume or both to any place on the property known as the 'Ebner Mine'.*"

This was a notice that Tripp could take the water anywhere on the Ebner property on either side of the creek, and does not indicate, as appellant states, that Tripp intended to use the water at the old air compressor or at the old Ebner mill. It cannot, we think, be plausibly contended that the notice evidenced an intent to divert the water from the old Ebner dam and to use it at the old air compressor on the Lotta claim; for, as appellant says (Brief p. 4) "the Ebner Company many

years prior to August 1, 1910" had thus diverted and used the water. The appellee, therefore, had the right by prescription to use the water at the old mill, and nothing could have been either gained or intended by posting the Tripp notice, except to acquire the water for use elsewhere on its property.

Appellant has surely overlooked the pleadings in this case, when it states that the notice did not show that Tripp, on the part of the appellee, intended to take the water out of Gold Creek above the appellant's dam. In paragraph V of appellee's answer (Tr. Vol. I, p. 33), there is the following averment:

"Water has been appropriated and diverted from streams for said mining and other beneficial uses, and that ever since said date (meaning 1880) it has been the universal and general rule, practice and custom for any person or corporation desiring to appropriate water for said last above mentioned purposes to post a notice in writing in a conspicuous place at the *point of intended diversion*."

The appellant, in paragraph III of its reply (Tr. Vol. I, p. 50), admits that it has been and is

"the universal and general rule, practice and custom for those desiring to appropriate water to post a notice in writing in a conspicuous place *at the point of intended diversion*".

According to this admission, the notice need not state that the locator intends to divert the water from any particular place or point; for, under the custom, the *mere posting at a particular point would be notice that the appropriator expected to take the water from the creek at that point.*

We have shown that, at the time of the posting of the notice, the property of appellee consisted, in addition to the patented property mentioned in appellant's brief, of the following unpatented claims and mill sites: the Parish No. 1, Cape Horn and Eureka claims, and the Cape Horn and Eureka mill sites, the Cape Horn mill site being the same as the Cape Horn No. 2 claim, which latter claim, as we have shown, was taken up by Ebner for the appellee.

Appellant says (Brief p. 37) that the Parish lode No. 2, south of and adjoining the Lotta, was held by the District Court of Alaska, in other litigation between the parties to this cause, to have been a void location, and the area covered by it to have been public land, at the time that the appellant built its dam on the ground covered by that claim; and that this decision was affirmed by this court (210 Fed. 599).

This statement is evidently made for the purpose of suggesting that the notice, posted by Tripp, could not have indicated an intention to divert the water from the place of appropriation to the Cape Horn mill site, because the flume, by which it was carried to the mill site, might pass over the Parish No. 2 claim, which was held to have been a void location. But this suggestion is without force, because, it is admitted that, at the time that the Tripp notice was posted, appellee had taken steps to locate the Parish No. 2 and was in actual possession thereof. Besides this, the decision of this court (210 Fed. 599), affirming the decree of the lower court that appellee's location of the Parish No. 2 was void, also declared that the land covered by that claim was Govern-

ment land; and, this being so, under section 2339 of the Revised Statutes, granting rights of way for mining ditches across public lands, the provisions of which were extended to Alaska in 1900 (31 Stat., p. 329), appellee had the right to build its flume across Parish No. 2

See

Lindley on Mines, section 530.

2. The Tripp notice initiated appellee's right to the water.

Appellant, at page 47 of its brief, characterizes the Tripp notice in substance as

not being sufficient to impart notice or to be of constructive notice to anyone; and further that constructive notice is always a creature of the statute and not of local custom * * * The notice posted could not operate constructively unless followed up with development in advance of intervening rights.

In answer to this view, it is, we think, sufficient to say:

First, that the posting of the Mulligan notice, under which appellant claims, was a trespass and appellant acquired no rights thereunder; second, that the work of appellee, in pursuance of its appropriation of the water of Gold Creek, was commenced before that of appellant, and, third, that under the universal custom which appellee pleads (Tr. Vol. I. p. 33), and which appellant admits in its reply, the posting of the notice of appropriation, without reference to its other contents at all, constituted notice of intention to appropriate the water at the place of posting and was the first step taken towards the appropriation and actual use of the water.

The case of *Van Dyke v. Midnight Sun*, 177 Fed. 85, is cited by appellant as announcing the doctrine that,

in Alaska, notice of appropriation of water upon the public land is not essential,

“inasmuch as the statutes of Alaska make no provision respecting the necessity of either the posting or recording of notices of appropriation of water upon the public land”.

But the decision in that case is, of course, not applicable here, because, in the *Van Dyke* case, there was nothing before the court to show any custom respecting the matter, while here it is directly averred in appellee's answer that it was the universal custom to post notice, which initiated the appropriator's rights, and this is admitted in appellant's reply. And, it is to be observed, appellant invokes the doctrine of the *Van Dyke* case only “if we are to assume that there was no local rule or custom on the subject”. But, of course, in view of the admission made by the pleadings, there is no room for the assumption that there was no local rule or custom, requiring the posting of notice for the initiation of proceedings for appropriation of water.

As is said in the case of *Ison v. Sturgill*, 109 Pac. 580:

“Notice shows *prima facie* an intention from the date of its posting to appropriate, and, if followed by diligence in the construction of the ditch, and diversion of the water, the right will relate from the time of giving the notice.”

In *Wiel*, on “*Water Rights*”, it is stated that, prior to any statutory provisions or rules, there was a custom of posting notice, and further:

“Provisions of the several codes of California are merely to fix the procedure whereby a certain definite time might be established as the date to

which the title should accrue by relation'' (Vol. I, p. 399).

So, the custom of posting, which is admitted in this case, has the force of a statute and, under the pleadings, is admitted to be the first step taken looking towards the appropriation of water. It is stated in one of the early cases of California (*Morton v. Solambo C. M. Co.*, 26 Cal. 527, 532), that there is no distinction between "custom" or "usage", the proof of which must rest in parol, and a "regulation" which may be adopted at a miners' meeting and embodied in a written local law.

The trial court held that neither the Tripp nor the Mulligan notice complied with the so-called miners' rules and regulations, which the court found were not in force (Tr. Vol. VII, p. 2670).

It may be observed, moreover, that the Mulligan notice, considered under the so-called miners' rules, is more defective in form than the Tripp notice. The Mulligan notice (Tr. Vol. VI, p. 2133) neither states the *place of intended use* nor the number of miners' inches of water *measured under a four-inch pressure*, as is provided in those rules.

We submit that, under the custom admitted by the pleadings, the Tripp notice initiated the rights of appellee to the waters of Gold Creek.

3. **Causes 803a and 804a of the District Court of the District of Alaska, Division No. 1, referred to by appellant in its brief, do not adversely affect appellee's case.**

At pages 34 and 35 of appellant's brief, it is said:

"There is another significant circumstance supporting the suggestion that neither the Ebner Com-

pany nor Tripp himself ever set up any claims under the so-called appropriation of water by Tripp. On August 25, 1910, the Ebner Company commenced a suit against the Alaska Juneau, complaining of the trespass committed by that company by reason of the interference with the waters of Gold Creek flowing through the Ebner property (Rec., Vol. V, p. 1963). On the same day a similar suit was commenced by Tripp (Rec., Vol. VI, p. 2155). In neither suit is there set up any claim to the waters of Gold Creek, either through the Tripp notice or otherwise, other than as riparian owners."

Again, on page 64 of its brief, appellant refers to the case above mentioned, and states:

"On August 25, 1910, the Ebner Company commenced suit against the Alaska Juneau sounding in trespass, alleging the very acts and things done by the Alaska Juneau looking to the appropriation of the water, and in the complaint in that action the Ebner Company set up that the Alaska Juneau had ever since July 27, 1910, been engaged in removing timber and clearing up what appears to be a right of way for a flume, ditch or pipe line to convey the waters of Gold Creek, and that if these acts were continued the Alaska Juneau would divert the water of Gold Creek from the Ebner Company."

We will first take up for analysis the case to which appellant refers (Tr. Vol. V, p. 1963). As reference to it is made in the lower court as Cause No. 803a, we will refer to it by that number, instead of by title.

We cannot conceive how Cause 803a can afford any aid to appellant in the case at bar. It is true that Cause 803a was commenced by appellee against the appellant, but in the complaint in that case it was directly averred, contrary to the statement in appellant's brief, that the

appellee has at all times been the *owner of all the water of Gold Creek by reason of prior location, location and appropriation, and use of the same* (Tr. Vol. V, p. 1965). Further, it was alleged in the complaint in that case that Mulligan had gone on the patented Lotta claim and posted a notice of appropriation of water, being the same Mulligan notice which is involved in the case at bar, *that such action of Mulligan constituted a trespass*, and that appellant was endeavoring to take the water from the patented Lotta claim over other property of appellee, and appellee asked for a restraining order enjoining appellant from these continuous trespasses.

The suit to which appellant refers in its brief as being found in the record at Vol. VI, p. 2155, is a cause brought by H. T. Tripp against the Alaska-Juneau Company, and is designated as Cause 804a, and to this, also, we will refer by number, instead of by title. This last suit was commenced on the 25th day of August, 1910, the same date that No. 803a was commenced. It was brought by Tripp to eject the appellant in this case from the Taku Queen lode claim, the Auk Chief lode mining claim and the Mary Alice placer claim.

The two lode claims, mentioned in No. 804a, are the two claims to which we will hereinafter refer (subdivision 4 of "Fourth"), under another heading, as being property located by Tripp and held by him in trust for the appellee in this case. These two claims, as will be seen from appellee's exhibit "S", are located at the lower end of appellee's property. Tripp held the legal title to these claims at the time that this suit No. 804a

was brought, and he necessarily, therefore, brought the suit in his own name.

It is shown by the testimony of John R. Winn in Volume IV, p. 1222, of the transcript, that Case No. 804a was dismissed. We are at a loss to conceive how appellant can deem it significant that, in that case, there was no reference to an appropriation of the waters of Gold Creek when the action, as it appears on the face of the complaint, was brought solely for the ejectment of the defendant therein from the lands of appellee.

THIRD.

THE MINERS' RULES AND REGULATIONS, PLEADED BY APPELLANT IN ITS REPLY, WERE NOT IN FORCE OR EFFECT AND HAVE NO BEARING ON THE TRIPP NOTICE.

The only averment made by the appellee in its answer, with respect to any local custom pertaining to the acquisition of water, was that as early as the year of 1880 the miners in the vicinity of Juneau and Silver Bow Basin, where appellee's property lies, *adopted a custom of posting a notice on the stream from where the water was sought to be taken*, and at the place of diversion, stating that so many miners' inches of water were claimed to be taken from such creek and used for beneficial purposes (see paragraph V of Answer, Tr. Vol. I, p. 33).

The appellant in its reply, referring to this custom of posting of notice as the first step looking towards the appropriation of water, admits that, in connection with the appropriation of water for the purpose which is

mentioned in the complaint, it is the universal and general rule and practice and custom for those desiring to appropriate water, to post a notice in writing in a conspicuous place at the point of intended diversion (paragraph III of Reply, Tr. Vol. I, p. 50).

Of course, by reason of this admission in the pleadings, the trial court was compelled to make a finding that this custom of posting was in force (Tr. Vol. VII, p. 2647).

But appellant also claimed, in the lower court, that that portion of Article VI of the rules and regulations of the miners of Harris Mining District, which requires the recording of the notice, was in force and effect at the time the rights of the respective parties in this case were initiated, and was in force and effect at the time of the trial of the case. This article provides as follows:

“Art. VI. A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein: first, he claims the water there flowing to the extent of (giving the number) inches, measured under a 6-inch pressure; second, the purpose for which he claims it and the place of intended use. A copy of the notice must within ten days after it is posted be recorded in the books kept by the recorder of the district.”

The trial court found against this claim of the appellant (see Finding of Fact No. X, Tr. Vol. VII, p. 2670).

Appellant now urges that that part of Article VI above referred to, which requires a copy of the notice to be recorded within ten days was always in force and effect, but makes no contention that any of the remaining part of the rules and regulations was in force or effect.

Appellant admits in its brief (p. 43) that.

"A great deal of oral testimony was introduced by both parties on the subject of these rules, the Ebner Company contending that they had fallen into disuse, and the Alaska-Juneau asserting that they were continuously observed and in force."

It seems to us that, by this admission, appellant has conceded that its contention with respect to these miners' rules and regulations is not open to it in this court, which will not disturb findings based upon conflicting evidence, unless manifestly erroneous.

It is not contended by the appellant that this finding is manifestly erroneous. In the event, however, that this court should desire to examine the evidence upon this subject, we desire to call to its attention the following evidence. To support its contention that the miners' rules and regulations were in force, appellant quotes from the testimony of the witness, Van Winkle. The testimony of this witness shows, however:

First, that out of 456 water location notices filed and recorded, there are 274 which simply have the date of the notice and have no date of posting; they show that they were filed within ten days from the date of the notice, but do not show when they were posted; that there are 35 which show, on their face, that they were recorded within ten days from the date of posting; that there are 34 which were not recorded within ten days of posting; that 95 of the notices do not show when they were posted, and were not recorded within ten days from the date of the notice, and bear no evidence to show that they were

ever posted; and that there are 18 without any date at all;

Second, that the rules were not followed with respect to showing a specific place of use, there being only 19 notices which designate the place of use; that 130 of the notices show no place of use; that 203 show a general place of use; and that 104 show that the water was to be used upon some claim, town site or mill site (Tr. Vol. V, pp. 1807 et seq.; Vol. VI, pp. 2367 et seq.).

An examination of the testimony of the various witnesses who testified concerning this matter will disclose that counsel for appellant, in introducing his proof in the lower court on these rules and regulations, read into the record what he claimed to be such rules, and then asked his witnesses to state their conclusion whether or not such rules had always been in force and effect. Upon cross-examination of the witnesses, their ignorance of the facts to which they had testified on direct examination was plainly shown. A great many of them had never located any water in the so-called Harris Mining District; a great many of them had never made any locations of water at all. A number of them had not, in recent years, had any talk with the miners within what used to be the boundaries of the Harris Mining District concerning what they understood the rules pertaining to the acquisition of water to be, or what they had been.

On the other hand, appellee called such witnesses as Captain J. T. Martin, who has resided in Juneau since prior to 1885, and who stated that he had never attended any miners' meetings, and that he had never heard of any miners' rules or regulations, pertaining to the acqui-

sition of water, discussed since back in the '80's. Martin also testified that, covering the period of his residence he had, to a large extent, been engaged in the mining business, and had never paid any attention to any such thing as "Miners' Rules and Regulations", in connection with the appropriation of water (Tr. Vol. V, pp. 1786, 1787).

Then there was the testimony of Tripp. He had resided in and about Juneau since 1896, and followed mining altogether; he was connected with the mining business ever since he went to that place; and a great many mining people and prospectors had talked with him. He stated that he never heard anything about such rules and regulations; that he had heard something about there being a Harris Mining District. He didn't know anything about the rules or customs or where the Harris Mining District was, or how much territory it contained; he had never heard anything about miners' meetings being held during his residence at Juneau (Tr. Vol. V, p. 1755).

William M. Ebner testified upon this subject. He is one of the oldest mining men in Alaska and has operated mines for years and made water locations and located mining claims. He stated that, as far back as 1891, he consulted with Judge A. K. Delaney, one of the old attorneys of Juneau, as to whether there were any miners' rules and regulations in force or effect, relating to the location and acquisition of water, and from this consultation and from conversations which he had with miners, he ascertained that there were no such rules or regulations (Tr. Vol. V, p. 1723).

F. J. Wettrick, a mining engineer and surveyor, also testified that he had had a great deal of experience with miners, relating to the location of water in Alaska, and that no definite rule upon this subject of recording notices had ever been followed by the miners (Tr. Vol. V, pp. 1687, 1688).

John Perelle and John Wagner, two other witnesses, testified that they were miners and had located a lot of water by posting notices, and they stated, substantially, that the custom which had been followed was to post the notice, but that there was no custom as to the time of filing or recording the notice (Tr. Vol. V, pp. 1758, 1764).

Neither Mr. Kinzie, superintendent of the Alaska-Juneau Company, nor Mr. Bradley, its president, at all times present in court, took the stand to testify concerning this question of miners' rules and regulations, pertaining to the acquisition of water. Moreover, in making out the Mulligan notice, the appellant in nowise complied with the rules with respect to the contents of the notice. This circumstance, we submit, is most persuasive evidence against the contention of appellant that the miners' rules and regulations, if any such ever existed, were in force or effect or have anything to do with the case at bar.

In conclusion on this subject, we feel justified in asserting that the conclusion of the trial court, that these rules and regulations were not in force or effect, was the only conclusion which the court could, under the evidence, have reached. Since 1882, too many changes

have taken place to attempt to make any application of these rules and regulations. It is shown by the record of this so-called organization in the Harris Mining District that, if it ever did exist, it extended only along the sea shore from what is known as Salmon Creek to Taku River, or where the Taku River empties into salt water, one river being to the north of Juneau and the other to the south of Juneau, and thence this district extended fifteen miles back from the shore line. This would have given the district an area of 15 miles by about 10 miles. At the time of the alleged passage of these rules and regulations, there was only a small area of southeastern Alaska in which gold had been discovered. Since then conditions have greatly changed, and in 1910, when, it is claimed by the appellant, these rules and regulations were in force, mining was being carried on from the north of Juneau, at Berners Bay, to the south of Juneau, below Wrangell, a distance of fully 150 or 200 miles, and thence to the westward as far as the boundaries of Alaska extend. Besides, since the time that appellant claims these rules were passed, the civil law has been extended to Alaska, recording districts have been formed, but the boundaries of the Harris Mining District were disregarded in the formation of the Juneau Recording District. No meeting of the miners has been called since the 5th day of February, 1888, at which time it appears that a quarrel existed among the miners and a dispute arose over the fact whether or not the mining district should be kept up. Those who opposed keeping up the organization were successful, and for

the last time elected their recorder for one year, and the records of the whole of Harris Mining District were left for safekeeping with the United States Commissioner, and ex-officio recorder, which latter position was created by the Act of 1884, extending civil government to Alaska.

We respectfully submit that the evidence amply supports the finding of the trial court, that no miners' rules and regulations had been or were in force.

FOURTH.

TRIPP POSTED, ON BEHALF OF THE APPELLEE, THE WATER LOCATION NOTICE ON THE 20TH OF JUNE, 1910, CLAIMING 10,000 MINERS' INCHES OF THE WATER OF GOLD CREEK, AND THIS NOTICE, AND THE WORK THEREAFTER DONE BY TRIPP UNDER IT, WAS FOR THE APPELLEE.

In 1908, and at the time that Tripp was employed by appellee, its property, as we have shown, consisted of the Lotta, Taku, Keystone, Golden Fleece, Grand Review, Jewel and Crown Point patented claims, and the Parish No. 1, Cape Horn and Eureka unpatented claims, and the Cape Horn and Eureka mill sites. The Cape Horn No. 2 lode claim was afterwards located by Ebner over the Cape Horn mill site for the benefit of appellee.

Under this head of our argument, we propose to show that it was for this property that Tripp appropriated the water of Gold Creek, and that the work which he did and the plans which he formulated were in furtherance of the general scheme which had been formed for the operation of this property.

1. Tripp was employed by Underwood, the owner of the majority of the capital stock of appellee, to operate appellee's property.

In 1908, soon after Ebner sold out his interest to Underwood, which consisted of practically all of the capital stock of the appellee, Underwood employed H. T. Tripp, a mining man and engineer, to take charge of the appellee's property and to examine the same and report on the feasibility of opening up and mining the property on a larger scale than had theretofore been done.

Ebner testified that Tripp was employed by F. L. Underwood, the purchaser of Ebner's interest, which was a large majority of the stock of appellee, and that Bent was in some way connected with Underwood and the California-Nevada Copper Company and had something to do with the employment of Tripp (Tr. Vol. III, p. 1087).

John R. Winn, one of the witnesses for appellee, testified that Bent was the manager of the California-Nevada Copper Company, a corporation (Tr. Vol. IV, pp. 1226, 32). Tripp testified that he was employed by F. L. Underwood.

The following letter was written by Underwood to Tripp, and will show that he employed Tripp and in what capacity:

"THE CALIFORNIA-NEVADA COPPER COMPANY,
115 Broadway, New York.

October 19th, 1909.

H. T. Tripp, Esq.,
Juneau, Alaska.

Dear Sir:

I have been industriously working to get a large

amount of working capital so that our minds could be at rest as to how much we could spend and soon could determine where our expenditure should best be made.

I now have as definite a promise of working capital as we will ever get. The arrangement should be concluded in a very few days.

I want you to find now the best millsite you can for the Ebner property as things now stand, for as I said no arrangement can be made for the Jualpa placer, and we want to get something fixed and probably everything will be worked in the Gold Creek Basin where we will build a 200 stamp mill next year. When you have settled on the spot for the mill, you can plan your tunnel, winze, etc. If my plans carry I can soon get out to you.

Very truly yours,

F. L. UNDERWOOD."

(Tr. Vol. VI, p. 2163).

Tripp further testified concerning his employment:

"I have been told and was told by Mr. Underwood that he had the Ebner mine and that he wanted to get adjoining properties to that, and I was out here looking around for that purpose, and never had any special occasion to ask anything of the Ebner mine, or ask them for possession, until I wanted to get to sampling; then I asked Mr. Ebner for the keys to the boarding house and the property, and told him I was then ready to commence operations, and I put an assay office up there, started the boarding house, and the watchman, who was the keeper for Mr. Ebner, then went to work for me" (Tr. Vol. II, p. 536).

He further said, in substance:

I met the directors of the Company (referring to California-Nevada Copper Company) while I was in New York, and the Secretary of the Company, but I was hired by Mr. F. L. Underwood and

the contract was made out on the California-Nevada stationery and Underwood was connected with the California-Nevada Copper Company (Tr. Vol. II, p. 539).

There were further declarations made by Tripp during his direct and redirect examination, showing that he was employed by Underwood, the purchaser of Ebner's interests in appellee, which was practically all of its shares of stock, as heretofore stated. We will show later that the California-Nevada Copper Company succeeded to the Underwood interests in appellee, and became the owner of all the shares of stock of appellee; and that Tripp was, toward the close of his work upon this property, looking to the California-Nevada Copper Company for his pay.

Tripp commenced his work in 1908 and continued until about August 3, 1910, and was in full control and possession of all the property of appellee during that time.

2. Tripp's plans with relation to, and his operations upon appellee's property contemplated the diversion of the water to the mill site at Shady Bend.

Tripp testified that the nature of his work was to find out the best location, most suitable to open the mines in a businesslike way, and that he examined every place along the line of the creek, had measurements made, mapped, and finally determined on the place for the mill at Shady Bend, near where the tunnel is now located and run; that the place to build the mill, as determined by him, was a short distance from where Mackay afterwards graded off the mill site and about

where the little stamp mill now stands (Tr. Vol. II, p. 513), on Cape Horn No. 2 lode, or known as Cape Horn mill site; and that the tunnel which he had determined to run would crosscut the formation of appellee's property, commencing down at Shady Bend (Cape Horn mill site, or Cape Horn No. 2 lode), up to the old workings of the appellee, near the 15-stamp mill, practically on the same line that Mackay afterwards ran the tunnel (Tr. Vol. II, p. 514).

Tripp kept in constant communication with Underwood and made all reports of his progress in his work to him. The letter above set forth is one of the many letters written by Underwood to Tripp (Tr. Vol. II, p. 514). Tripp, in 1909, stripped off the surface ground along the line of his long tunnel and blasted and cut in and faced it up and got ready to commence work on it (Tr. Vol. II, p. 515).

In connection with this work upon the tunnel, and also as showing that Tripp had full authority to locate and lay out the tunnel for appellee, as he did, we call the court's attention to a letter written by Tripp to Ebner, and to one written by Ebner to Tripp, which were offered in evidence as appellee's exhibits "F" and "E", respectively, without objection.

DEFENDANT'S EXHIBIT "F".

"Juneau, Alaska,
Sept. 25th, 1909.

Wm. M. Ebner, Esq.,
Juneau, Alaska.

Dear Sir:

In consideration of a communication, bearing even date with this letter, has been received by me, set-

ting forth that you are the owner of one Lode Claim called 'Cape Horn Number Two', and located in Julapa Basin and joining 'Cape Horn' Claim on the Southwest.

Having in company with you selected a location which we have jointly agreed upon as being the proper location for a tunnel to the Ebner Mines. Being desirous of having assessment work done in a proper place, where it will be a benefit for the 'Cape Horn' Claim, the 'Cape Horn Number Two', and the 'Eureka' Claim, as well as for the common benefit of all mines Northerly and Easterly from this point on the Juneau Belt.

As the agent for the California Nevada Copper Co., and F. L. Underwood, I agree to do this assessment work, amounting to three hundred (\$300.00) dollars, for the special benefit of the three claims, 'Cape Horn,' 'Cape Horn Number Two' and 'Eureka,' for the year 1909.

Respectfully yours,

H. T. TRIPP."

(Tr. Vol. VI, p. 2164).

DEFENDANT'S EXHIBIT "E."

"Juneau, Alaska, September 25, 1909.

H. T. Tripp, Esq.,

Supt. Calif. Nevada Copper Co. and

F. L. Underwood,

Juneau, Alaska.

Dear Sir:

In view of the fact that F. L. Underwood holds in escrow one certain deed conveying one Cape Horn and Eureka Lode Claim, upon which the assessment work for the year of 1909 must be performed for the purpose of holding the same and complying with the law, and for the further fact that said F. L. Underwood has agreed to do said assessment work.

I being the owner of one lode claim called the Cape Horn No. 2 and a proper place for starting a

long working tunnel, I make to you the following proposition: That all the assessment work on these three claims, Cape Horn, Eureka and Cape Horn No. 2 be performed in starting this tunnel. I will further state that negotiations are now pending for the transfer of Cape Horn No. 2 to the said F. L. Underwood. It is the intention that in the final settlement Cape Horn No. 2 will be transferred to the said F. L. Underwood.

Yours respectfully,

WILLIAM M. EBNER."

(Tr. Vol. VI, p. 2165.)

It has been shown by the testimony of Ebner that he made this location of the Cape Horn No. 2 lode claim, above referred to in the letter, in 1908, over the Cape Horn mill site, and made it especially for Underwood, and for appellee's benefit, as there was quartz found upon it and as it was safer to hold it as a quartz claim than as a mill site.

Tripp was present when the location of the lode claim was made and reported to Underwood. Tripp, in speaking of the Cape Horn mill site, stated, in substance:

I knew there was a mill site located down there, which was considered a part of the *Ebner Mine*, and it was talked over as being a mill site that belonged to the *Ebner property* and was considered such (Tr. Vol. II, pp. 541, 542).

Tripp, on cross-examination, when being asked about the nature of his employment, testified that his examination of the property was not in order to find out whether the property was or was not good property to buy, "because they (referring to Underwood) had already had some understanding about buying it;" but that the

purpose of his examination was to find out about enlarging the property, to see what the extent of it was, and to get at the most feasible way of working it (Tr. Vol. II, pp. 543, 544).

Tripp further testified that he followed out the directions of the Ebner letter, above set forth, and commenced running the tunnel at the place indicated by Ebner, and that the work done thereon served the two-fold purpose, to wit, the commencement of the tunnel and the performance of the assessment work upon the mining claims referred to in the Ebner letter (Tr. Vol. II, p. 578).

The trial court, after hearing all the testimony and evidence upon the nature of Tripp's employment and what he was doing, made its Finding No. III (Tr. Vol. VII, pp. 2644, 2645), part of which is as follows:

“That said Tripp made a thorough examination of the property, its formation, the ore body or bodies, and the water of Gold Creek flowing there through, and reported favorably on what the said Ebner and Ebner Gold Mining Company had concluded to do. That Tripp completed his work and made his report about the last of June or first of July, 1910.”

We have thus far shown that Tripp was employed by Underwood, at the time that Underwood owned practically all the shares of the capital stock of the appellee, and that he either bought or had options on all of the mining claims and mill sites that had been located by Ebner for the benefit of appellee's property. Therefore, it cannot be questioned that anything that Tripp did,

under this employment, was done for appellee and for the benefit of appellee's property.

Tripp, having decided upon a plan for opening up and mining the property on a larger scale than Ebner had operated it, and having determined to commence the large working tunnel on the Cape Horn No. 2 lode claim, or mill site, and to build a mill in that same vicinity, and while having all these matters under consideration, and while employed as above stated, on the 20th day of June, 1910, posted his notice of water location or notice of appropriating and taking from Gold Creek at the old Ebner dam (on the Golden Fleece lode claim of appellee) 10,000 miners' inches of water, intending to convey it by flume or pipe line, or both, to the place of commencing the tunnel, and to build the mill at Shady Bend on the Cape Horn No. 2 claim, known also as the Cape Horn mill site.

Tripp's scheme for conducting of the water from the old Ebner dam to Shady Bend was to take it down the southerly side of Gold Creek, conducting it from the old Ebner dam, through the old flume line of the appellee, down to the pen stock, just above the air compressor which Ebner had built on the Lotta claim, thence from that pen stock, down and across the creek to Shady Bend or Cape Horn No. 2 claim or mill site, and there to apply it to use and return the water to Gold Creek. The plan which Mackay had, as we shall hereafter show, was to convey the water from the old Ebner dam to Shady Bend or Cape Horn No. 2 lode claim or mill site, on the opposite side of the creek; he intended to apply it, however, to use at the same point

at which Tripp would have applied it, had he carried out his plan—*which point was below the intake of appellant's flume.*

Appellant, in its brief, has given a synopsis of what it conceives Tripp's testimony to have been. But that synopsis is unsatisfactory, disjointed, and to some extent an erroneous construction of Tripp's testimony concerning the water right in controversy. This testimony is important and we, therefore, quote some of it *verbatim*, especially that concerning the posting of the notice of the appropriation of 10,000 miners' inches of water, his intention in so doing, and other matters connected therewith. After he had testified concerning the posting of the notice on June 20, 1910, the following occurred:

“Q. What purpose did you have in view in putting up this water notice that you have just testified concerning?

A. I had received a cablegram from Mr. Underwood telling me to commence work immediately on the construction of the flume carrying the water out of Gold Creek, and at that time I went up there, or a day or two afterwards, and located this water with the expectation to commence work and build a flume and convey the water down along the plans and lines that I had in view.

Q. Down to near this point where you had commenced this tunnel at Shady Bend?

A. Yes, sir.

Q. How near the point had you expected to bring the water with reference to the end of the new high line flume of the Ebner Company as it is constructed?

A. Well, my idea was to have gone down where the line of the old Ebner flume is and I would have

built a new flume on a little different grade, and would have connected up a pipe line with the air compressor that is now located there, which I had repaired and put in proper shape to be used, and with the air from that compressor I would have blown out a line for a pipe around Cape Horn, and to this place practically where the mill site is now below Shady Bend; that is the plan that I had laid out" (Tr. Vol. II, p. 522).

He further testified, with reference to his preparations to apply the water so appropriated by him for the working of the Ebner property, as follows:

"Q. I will ask you, Mr. Tripp, if you had any machinery or air compressors, or anything of that kind on hand in 1910, which was calculated to be used in the opening up of this property as you had decided to do?

A. I had purchased an air compressor and had it stored down here in Juneau and had drilling machinery and the necessary equipment for an air compressor" (Tr. Vol. II, pp. 526, 527).

In 1910, when Tripp repaired the appellee's dam and the flume line between the dam and the air compressor on the Lotta claim, he did so for the purposes,

First, of applying the water to use at this compressor on the Lotta claim, for the purpose of starting up the work under his new plans; that is, in connection with grading off a flume line, for a flume extending from the end of the old flume, just above the air compressor on the Lotta claim, around to Shady Bend;

Second, of having the dam in good repair for the taking of the water through the old flume and connecting it up with the new flume line which he expected to construct around to Shady Bend; and

Third, of running the dynamo to generate electricity for general use around the premises.

In connection with these matters and to verify the statement that we have just made, we here quote Tripp's testimony, as follows:

“Q. Now, Mr. Hellenthal also asked you a number of questions concerning the repair of the dam, when you made it, I think in 1910, you were repairing the dam for the use of the water for what purpose, if any?

A. Well, we had been running the electric lights that had been used in the assay office and around the place generally, and I had put the dam in order at that time to have it so we could turn the water on at any time we needed it to run the dynamo or the compressor, either.

Q. What were you expecting to use the compressor for?

A. I calculated to use that compressor, the first time I used it, in blasting out a right of way for a pipe line and whatever we would need after we built the flume to the compressor.

Q. That is, there was an expectation to use it in connection with the new flume line?

A. There was.

Q. Where were you expecting to build this new flume line to—to what point, Mr. Tripp?

A. It was my idea to run it along the line of the old flume, to pass where the end of it is now, and then conduct the water by pipe down across the Gold Creek Canyon and around Cape Horn to where we proposed to set up our compressors and so forth.

Q. That was the plan that you had in mind at the time you were doing this repair work on the dam?

A. That was the outline that had been adopted; Mr. Huntoon had been sent up here as an engineer

to consult with me, and I had gone over the whole proposition with him.

Q. Who was Huntoon—do you remember by whom he was sent here?

A. Was sent here by Underwood" (Tr. Vol. II, p. 567).

Re-Cross Examination by Mr. Hellenthal.

"Q. When was this Mr. Huntoon here, Mr. Tripp?

A. Huntoon was here just before the arrival of the Bent party. I think he was here up to the time they arrived. That was in July, 1910" (Tr. Vol. II, pp. 566, 567).

"Q. Now, when you posted your notice of location for the water, it was your intention to appropriate the water and carry it to whatever mill site might afterwards be selected by the company, wasn't it?

A. That was not my intention" (Tr. Vol. II, p. 568).

"Q. That is true, the location for the appropriation of the water was for the new mill wherever it might be?

A. Certainly would be; but, however, that isn't the question that you asked me before—you asked me as to my judgment or my opinion, or something of that sort. My intention was to convey the water to that place at Shady Bend where I told you that I had located a place for a tunnel and for a mill site.

Q. You had located a place for the tunnel and mill site, had you?

A. Yes.

Q. And the appropriation of the water was for whatever place the Company might afterwards decide to build the mill on; is that right?

A. The appropriation of the water was to be used for the benefit of the mill" (Tr. Vol. II, p. 569).

Appellant states in its brief something to the effect that Tripp never communicated to the appellee, or to those who succeeded it in the work on appellee's property, anything about his having posted the water location notice (Brief, p. 33). This matter was also referred to at the oral argument, when counsel for appellee asserted that counsel for appellant were wrong, and that John R. Winn, who was attorney for appellee and the California-Nevada Copper Company, later known as the Alaska-Ebner Gold Mines Company, had spoken to Tripp about this notice, about the time that he, Tripp, quit the employ of Underwood, or of the above mentioned companies, and that this was on or about the 3rd of August, 1910; that Tripp made a search for a duplicate copy of the notice and failed to find it, and then made a trip out to the westward on some mining business and did not return until October of that year. The testimony upon this matter is as follows:

John R. Winn testified that he had resided in Juneau since 1897, and that he was familiar with the Ebner property ever since and before Ebner disposed of his stock to Underwood; that he had been attorney for the Ebner Gold Mining Company for several years, and also attorney for the Alaska-Ebner Gold Mining (Mines) Company, or the California-Nevada Copper Company, and had business for all these companies, and was attorney for the Ebner Gold Mining Company prior to 1910 (Tr. Vol. IV, pp. 1218, 1219).

Tripp testified, in substance:

I gave the water notice to Judge Winn (meaning John R. Winn), after I came back from the

westward. That I gave it to him as soon as I found it. I don't think that I got back from the westward until sometime in October, and that I left for the westward sometime about the 11th of August (1910). My wife told me that Judge Winn had been up to my house and that they ransacked everything in the shape of documents and papers to find that notice. He (meaning Winn) asked me before I left, but I couldn't find it (Tr. Vol. II, p. 579). I didn't know where I had put it. It (the notice) wasn't lost; it was in my safe in the C. W. Young Company's building (Tr. Vol. II, p. 579).

3. All acts done by Tripp with respect to appellee's mining property inured to the benefit of appellee.

Appellant repeats, in several forms in its brief, that Tripp was a stranger to appellee, and, hence, that what Tripp did, did not inure to the benefit of appellee, especially as, appellant asserts, the appellee claimed no right under the Tripp water location notice. No warrant for this assertion is found in the record.

(a) The water right appropriated by Tripp became appurtenant to appellee's land.

The water was to be taken out of the creek at the place where Tripp posted his notice on the patented Lotta claim, the property of the appellee, and was to be conveyed over the property of appellee, and to be put to use on its Cape Horn No. 2 lode claim, or Cape Horn mill site, and afterwards returned to Gold Creek off the premises of appellee. This water right and flume and right to the use of the water, being all upon appellee's property, were intended to become, and became, appurtenant to its property and a part of it. No con-

veyance could be made of them by Tripp, for the reason that he did not own any interest in the property from which the water was taken, over which it was conducted, nor the property where it was put to use. The water was appurtenant to the property for the further reason that it was taken up to mill the ore to be mined on the property. And, moreover, it was appropriated by Tripp as the agent of Underwood, who, as a majority stockholder in appellee, represented the appellee, as did all of Underwood's successors to his interest in the stock of appellee.

- (b) A majority stockholder represents the corporation, and everything done by him, with reference to the corporation's property, inures to the benefit of the corporation.

Underwood was the holder of a large majority of the stock of the appellee. Therefore, his work on the appellee's property must have been as agent of the appellee. In any view, he bore a fiduciary relation to the company. Consequently, any additions or betterments which he, or his agent, Tripp, made on the property, necessarily accrued to the benefit of the company. The relationship of a majority stockholder to the company is well stated in *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 159 Fed. 393, 394, as follows:

“The holder of the majority of the stock of a corporation has the power, by the election of bid-dable directors and by the vote of his stock, to do everything that the corporation can do. His power to control and direct the action of the corporation places him in its shoes, and constitutes him the actual, if not the technical, trustee for the holders

of the minority of the stock. He draws to himself and uses all the powers of the corporation. In effect he holds an irrevocable power of attorney from the minority stockholders to manage and to sell the property of the corporation, for himself and for them. * * *

This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty, the duty of a *fiduciary* or *agent*, to the holders of the minority of the stock, who can act only through him, the duty to exercise good faith, care, and diligence *to make the property of the corporation produce the largest possible amount*, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property."

See also:

Jones v. Missouri-Edison Electric Company, 144 Fed., 771;

Union Pacific R. Co. v. Frank, 226 Fed., at page 920;

Davis v. Virginia Ry. & Power Co., 229 Fed., at page 640;

Sidell v. Missouri Pac. Ry. Co., 78 Fed., page 727;

Ervin v. Oregon Ry. & Nav. Co., 27 Fed., page 631;

Meeker v. Winthrop Iron Co., 17 Fed., page 48;

Sage v. Culver et al., 41 N. E., page 513.

4. The property acquired and located by Tripp was held by him in trust for the appellee.

We have already shown that Underwood and his successors in interest, who employed Tripp, were majority

stockholders in appellee and that everything done by them or by their agent, Tripp, was for the benefit of appellee. We have related some of the things which were done by Tripp looking towards the opening up, developing and the mining of appellee's property on a larger scale than had been done by Ebner. However, we have not given all that Tripp did in respect to carrying out this undertaking.

In addition to the posting of the notice of location and appropriation of 10,000 miners' inches of water of Gold Creek, as an incident to carrying out his undertaking and scheme of opening up and working the property, and the other work done by him, Tripp also found some vacant ground that he thought would be of some benefit and help to appellee in perfecting what he, Tripp, had undertaken to do; and, while in the employ of Underwood or the California-Nevada Copper Company, he located the following lode mining claims: The Auk Chief lode mining claim and the Fractional lode mining claim; and also purchased of one Thomas J. McCully the Taku Queen lode mining claim (Tr. Vol. VI, p. 2260). These claims all appear upon defendant's exhibit "S", and their relative position to the remaining property of appellee can readily be seen by an inspection of this exhibit (Tr. Vol. VII, p. 2681).

All of the property above referred to, except the Fractional lode claim, was made the subject of the suit in ejectment, No. 804a, to which reference has above been made.

It is contended by appellant that Tripp was claiming this property adversely to the appellee (Brief p. 37).

The only evidence to support this contention is the complaint, in suit No. 804a (Tr. Vol. VI, p. 2155). This suit, as above stated, was begun in the name of Tripp, solely for the reason that the paper title at that time was in him; and the suit was, of course, instituted by him for the benefit of appellee. The case was afterwards dismissed (Tr. Vol. IV, p. 1222). Tripp claimed that appellant was trespassing upon this property and he very properly sought to protect the property for the appellee by suing in his own name, as the paper title was in him. The testimony, moreover, shows that Tripp, as a representative or agent of appellee, and for appellee and not otherwise, took up the property and bought the claim from one McCully (Tr. Vol. IV, p. 1222). These claims were identified by the witness, John R. Winn, as having been held in trust by Tripp for appellee (Tr. Vol. IV, p. 1273).

As Tripp, as we have heretofore shown, went upon appellee's property with the view of devising plans for operating it for the benefit of appellee and, as the adjacent property, taken in Tripp's name, was taken in pursuance of his plan for operating appellee's property, it is entirely clear that this adjacent property was held by Tripp in trust for appellee.

Judge Lindley, in Volume 2 of his work on Mines, paragraph 407 states the rule thus:

“An agent cannot make a profit for himself out of the business in which he is engaged for his principal or make use of the information obtained through his employment to acquire interests in the subject matter of his agency adverse to those of his principal.”

In *Pomeroy's Equity Jurisprudence*, Volume 2, section 959, it is said:

“* * * if he (the agent) has taken the legal title to property in violation of his fiduciary duty, equity will treat him as a trustee thereof for his principal.”

It cannot be open to doubt, therefore, that the new property, located by Tripp, and which adjoined the claims of appellee, and which was located by Tripp for the better working of the original claim of appellee, became the property of appellee.

5. Tripp's conveyance to Hoops cannot derogate from the correctness of this conclusion.

On April 4, 1912, it appears that Tripp made out a paper writing purporting to convey these claims, together with “that certain ditch and water right to 10,000 miners’ inches of water flowing in Gold Creek” to one H. W. Hoops (Tr. Vol. VI, p. 2263). On March 10, 1913, Hoops attempted to convey this property and the water right and ditch to one Sidney J. Jennings (Tr. Vol. VI, p. 2267). On May 21, 1914, before the trial of this case, appellee received the paper title to the property, which had been taken up for it and had been held in trust for it by Tripp, through what purports to be a deed from Sidney J. Jennings to appellee (Tr. Vol. VI, p. 2271).

The conveyance from Tripp to Hoops, even if the latter had been a stranger to appellee, could amount to nothing more than a declaration by an agent against the interest of his principal, with relation to property which

the principal owned, and could not be evidence against the principal. But Hoops, at the time he received the conveyance from Tripp, was a creditor, stockholder and bondholder in the California-Nevada Copper Company, which was the owner of the shares of stock of the appellee, or at least of the Underwood interest, and this company thereafter became the owner of all the shares of stock of the appellee. Hoops, in addition to standing in the capacity above mentioned with relation to appellee, had been assisting in raising money to carry on the operations under Mackay, and understood the situation entirely (Tr. Vol. IV, pp. 1236, 1237). It is, therefore, clear that the conveyance to Hoops was no evidence whatever of any understanding by Tripp that he did not hold the property as agent and trustee for appellee.

6. The activities of the California-Nevada Copper Company, the name of which was changed to Alaska-Ebner Gold Mines Company, inured to appellee's benefit.

The California-Nevada Copper Company and the Alaska-Ebner Gold Mines Company were and are one and the same corporation. The company had its name changed from the former name to the latter. This was done some time after Tripp had commenced working on appellee's property (see testimony of John R. Winn, Tr. Vol. IV, pp. 1226, 1227, 1233).

The California-Nevada Copper Company and Underwood were, in the first instance, raising the money for Tripp's operations. Later on, the "Chapman" com-

mittee and the Copper Company together were raising money for the work (Tr. Vol. IV, p. 1227).

The California-Nevada Copper Company, before changing its name to Alaska-Ebner Gold Mines Company, gave a mortgage to the Standard Trust Company of New York and Edward M. F. Miller, trustees. This mortgage is dated December 15, 1907, and was offered in evidence by appellant and marked "Plaintiff's Exhibit No. 39", and is found at page 2010 of Volume V of the Transcript. This mortgage covered after-acquired property. The "Chapman" committee, above referred to, succeeded in procuring for the mortgagor, the California-Nevada Copper Company, the entire capital stock of appellee, including, of course, the stock which Ebner had sold to Underwood; and all this stock became subject to the mortgage (Tr. Vol. IV, pp. 1229, 1230). The mortgage was foreclosed and the stock sold in the State of New York (Tr. Vol. IV, p. 1229), in either 1912 or 1913 (Tr. Vol. IV, p. 1238).

As heretofore noted, appellant states in its brief something concerning a suit which Tripp brought against the California-Nevada Copper Company to recover wages due him for his services. The above and foregoing explanation shows plainly why Tripp sued that company instead of Underwood. The Copper Company had succeeded to Underwood's interest; it got from him the stock of appellee, sold to him by Ebner, and it finally became the owner of all the stock of appellee; and, during the year of 1910, the California-Nevada Copper Company furnished all the money to carry on the work on appellee's property (Tr. Vol. IV, p. 1235).

It thus appears that Underwood and the Copper Company, in all their activities respecting the appellee's property, as majority stockholders in appellee, were acting in behalf of appellee.

FIFTH.

THE WORK ON THE PROPERTY OF APPELLEE PLANNED BY EBNER AND COMMENCED BY TRIPP WAS PROSECUTED WITH DILIGENCE BY MACKAY AND MUIR FOR APPELLEE.

It has been shown that Tripp retired from the service of Underwood and the California-Nevada Copper Company, representatives of appellee, about the first of August, 1910, and that Angus Mackay succeeded Tripp. It is now our purpose to show that the work on the property, planned by Ebner and commenced by Tripp, was carried on with diligence by Mackay and one Muir for the appellee.

1. The work was carried on with diligence on behalf of appellee.

We will, first, show that Mackay was employed by Underwood and the California-Nevada Copper Company for appellee; second, that he held possession of the physical property of appellee as receiver thereof; third, that he was employed, while receiver, by the United States Smelting, Refining & Mining Exploration Company, optionee of all of the shares of stock of the appellee, and that all the work which he did on the property, was for appellee and for its benefit; and, fourth, that one Muir, as well as Mackay, was employed by the

United States Smelting, Refining & Mining Exploration Company, as optionee of all of the shares of stock of appellee, and that they did work for the appellee and for its benefit.

At the risk of repeating some of the testimony we will point out the evidence material in this connection, so that the discussion of this subject may be completely before the court.

Ebner testified that Mackay, after Tripp had retired from the service of Underwood and the California-Nevada Copper Company, he took charge of the work for Underwood and the California-Nevada Copper Company (Tr. Vol. III, pp. 1086, 1087). Bent was the general manager of the California-Nevada Copper Company and Mackay was Bent's assistant (Tr. Vol. IV, p. 1235). Mackay testified that he made arrangements with F. L. Underwood in New York to go to Juneau and build a mill on appellee's property; that he stopped on his way from New York in Chicago to see about the machinery for the mill, and stopped in Seattle, Washington, to commence getting out the timbers and lumber for the mill (Tr. Vol. II, p. 719). The agreement which Mackay had in New York with Underwood was made about the first of June, 1910. Mackay was to come out to the Coast, stop at Seattle, and get out the timbers and lumber for a 200-stamp mill, to be built upon appellee's property. Mackay left New York shortly after having made this agreement with Underwood, stopped at Chicago for the purpose above mentioned, and arrived at Seattle about the 10th of June, and commenced preparing the timbers and

lumber at Seattle for the 200-stamp mill, some time in the month of July, 1910 (Tr. Vol. II, p. 695). Bent and his party arrived in Juneau in July, 1910.

On the 3rd day of August, 1910, Bent and some of his party, and Mackay and Hill & Wettrick, surveyors, went upon the Ebner property and made some observations, secured some data and information, which they afterwards used in laying out the scheme of development which they had under discussion (Tr. Vol. II, p. 605).

Hill & Wettrick took some levels for the purpose of securing data necessary to determine how the scheme of development should best be carried out (Tr. Vol. II, p. 606). They had directions from Bent and his people about taking the levels, and had in view, particularly where the line of the new flume should be run. The reason that they projected levels across from the old Ebner flume to the opposite side of the canyon, was to determine the line of grade which the new flume would follow along the hillside, leading from the Ebner dam on Golden Fleece lode claim toward Cape Horn on the Cape Horn Lode No. 2 claim—all the property of appellee. They were instructed by Bent and Mackay to make such examination and report; and the object of taking such levels was to avail themselves of the increased head of water obtainable in that way and thereby to develop more power. The power was to be used at Shady Bend in connection *with operations which were planned and discussed by Bent and his party, including Mackay* (Tr. Vol. II, p. 607). The line, which was being sur-

veyed by Hill & Wettrick, was on the northerly side of Gold Creek. The matter of excavation for the 200-stamp mill was discussed, and the point in view was in the vicinity where the excavation was afterwards made (Tr. Vol. II, p. 608).

In this connection, we call attention to Ebner's testimony, that he had a survey made of the contemplated flume line, before he sold out his interest to Underwood, and that this survey was precisely at the same place which Wettrick surveyed out and where the flume was afterwards constructed; that is, the new flume on the property of appellee. Ebner further testified that he and the appellee had settled upon the place to commence the tunnel, and in his letter to Tripp, under date of September 25, 1909, as set forth in this brief (Tr. Vol. VI, p. 2165), he indicated to Tripp the place which he had decided upon to commence the tunnel, being about 50 or 60 feet from where the tunnel was afterwards actually commenced and has been driven; all on Cape Horn No. 2 lode claim, and on the Cape Horn mill site.

The only difference in the plans of Ebner, Tripp and Mackay was that Tripp had contemplated taking the water from the old Ebner dam, down through the old Ebner flume to where the penstock was built just above the air compressor on the Lotta lode claim, then to convey it down the creek from this penstock in a new flume or pipe line on the southerly side of the creek, crossing over the creek with the flume, and to apply it to use for the working of the property on the Cape Horn No. 2 lode claim; while Bent and Mackay adopted the Ebner

plan and took the water through a new flume from the Ebner dam and conveyed it down the northerly side of the creek to the Cape Horn lode or mill site and to the same spot where Tripp had expected to take it. In either case, the point of application of water to use by appellee was below the intake of appellant, and affected appellant in the same way.

Wettrick, the surveyor of Bent, states that he was not called upon, when he went on the ground, on August 3, 1910, at the request of Bent and his people, to make a survey of any other flume line than the one upon which the new flume was afterwards built, and that he had an understanding with Bent before they went upon the ground that he, Wettrick, was simply to survey out this flume line, and no other, and that no other place was contemplated for a mill site by Bent and Wettrick and Mackay, than the mill site which Mackay afterwards graded for the purpose of erecting the 200-stamp mill (Tr. Vol. II, pp. 678, 691, 692, 697).

We have dwelt upon this point at some length, in order to meet the suggestion of appellant that there was never any common plan agreed upon by appellee, or those acting in its behalf, concerning the opening up and mining of appellee's property upon a larger scale than had been done under Ebner's superintendency.

We also call attention to the foregoing evidence as serving to entirely refute the contention of appellant that the posting of the Tripp water location, and the work done by Tripp, were "speculative".

Some time along about the 10th or 15th of August, Mackay left Juneau and returned to Seattle for the

purpose of getting out the lumber and timber for the 200-stamp mill, and Bent was left in charge of appellee's property. When Mackay returned from Seattle, some time in the early part of September, Bent had commenced the work of preparing, clearing off, and grading the flume line for the new flume; and one Black had commenced this work at the old Ebner dam and was extending it down toward the mill site on Cape Horn No. 2 lode claim. Mackay took over the superintendence of the work from Bent, who was acting for Underwood and the California-Nevada Copper Company—that is to say, Mackay was made superintendent of all of the surface ground work, such as building the flume, grading the place for the construction of the 200-stamp mill on Cape Horn No. 2, for which work he had been previously employed by Underwood. Mackay was also to have charge of the underground work and the running of the new tunnel. Bent shortly thereafter left Juneau (Tr. Vol. II, pp. 696-700). Hill & Wettrick pursued their work under their contract with Bent.

2. Any apparent lack of diligence in the operations of appellee was due to the acts of appellant.

Appellant says:

“The construction of the new Ebner flume carried the water down to a proposed mill site and for a period of over two years was not used for any purpose whatever” (Appellant's Brief, p. 69).

The foregoing statement attacks the diligence of the appellee in the prosecution of its work, looking toward the appropriation of the water of Gold Creek and putting

it to beneficial use. To refute this statement, it would seem sufficient to call the court's attention to Finding of Fact VII of the trial court (Tr. Vol. VII, p. 2659), a portion of which is as follows:

“That work was commenced under said Tripp notice and those for whom said water was located, and their successors in interest have proceeded with due diligence with their work in the opening up and developing of said mining property and the application of the water of Gold Creek under said notice to actual use.”

However, it does appear that there was a short time, during the progress of the work of appellee, in which there was a lull in its activities. This was made an issue under the pleadings, and the explanation which appellee gave was satisfactory to the trial court, and it made the above finding after hearing all the proof pertaining to this matter.

The reason for the lull in the work, which was being carried on by Mackay is readily explained. The explanation places the blame for it at the door of appellant.

The Ebner high line flume was, according to the evidence and the findings of the trial court, completed in the fall of 1910. It commenced at the old Ebner dam and extended down to Shady Bend, or the mill site, and was over 4,000 feet long. In December, 1910, Mackay commenced the driving of the new working tunnel and in October, 1911, had it completed for a distance of 1,185 feet. There was not much else done by Mackay until May or June, 1913, on the appellee's property, except the assessment work on the unpatented property,

and the keeping in repair of the improvements which had been placed thereon, Mackay at all times retaining possession of the property. It is an undisputed fact that, through certain proceedings had in the United States District Court for the Southern District of New York, receivers were appointed for the Alaska-Ebner Gold Mines Company in April, 1912. The name of the California-Nevada Copper Company had been changed to the Alaska-Ebner Gold Mines Company, and the latter company was at the time of the appointment of the receivers the holder of all the shares of stock of the appellee, or became the owner and holder thereof shortly thereafter. In April, 1912, Mackay was, by the District Court at Juneau, appointed temporary receiver of all the physical property of appellee and retained possession of the same. On the 29th day of June, 1912, by an order of the same court, in the case of Valdemar T. Hammer, plaintiff, v. Alaska-Ebner Gold Mines Company and the appellee, defendants, Mackay was appointed receiver, ancillary to the New York receivers, and in July, 1912, entered upon the duties as such receiver, and remained in charge of all the physical property of appellee. These facts are alleged in paragraph IV of the complaint (Tr. Vol. I, p. 3), and they are admitted by the answer (Tr. Vol. I, p. 28).

As Mackay stopped work on the appellee's property in October, 1911, and the receivers were appointed for the Alaska-Ebner Gold Mines Company, the owner of the stock of appellee in April, 1912, there was only a short period of about five months in which the work was closed down.

3. The appointment of the receivers of the property of appellee and the closing down of the work thereon was due to appellant.

In proof of the fact that the appointment of the receivers of the property of appellee and the closing down of the work thereon was due to appellant, we refer the court to some undisputed testimony concerning a number of instances of annoyances and obstacles placed by appellant in the way of the progress of the work under Mackay, to some vexatious law suits brought by appellant, to actions which appellee had to bring to protect its rights, and to instances of "jumping" of the patented property of appellee by appellant. All of these things caused the cessation of active operations by the appellee.

Mackay stated that, in the conduct of his work, he had to buy lumber, and that he ordered lumber from the saw mill on Douglas Island near Juneau, and that the same was already sawed, but it was afterwards taken from him by Bradley, president of appellant; and Mackay was put to the trouble of scouring the country for lumber. He further stated that

"it was pretty hard to raise money back there (meaning back East) we found out; so much litigation was brought against the Company and jumping of the claims, and it was pretty well known in New York where they were getting the money"

—that appellant was causing the trouble (Tr. Vol. III, pp. 1188, 1189).

George Noble stated that the first he had to do with any property of appellee was in 1910, that he was in

Alaska at that time, and was a bondholder of The Alaska-Ebner Gold Mines Company, owner of the capital stock of appellee; that he was soliciting money to carry through the plans to build a 200-stamp mill on the appellee's mine; that he had heard the testimony on the trial of the case at bar, and the plans of opening up and developing the Ebner mines as testified to by witnesses were the plans to which he had reference in his testimony, that he was a bondholder under the mortgage which Mr. Hellenthal offered in evidence in this case (Tr. Vol. IV, p. 1277). (The mortgage referred to is that of the California-Nevada Copper Company to the Standard Trust Company.) He further testified that he first came to Juneau in 1912; that when he came there he was representing a majority of the bondholders of the Alaska-Ebner Gold Mines Company, or what was formerly known as California-Nevada Copper Company; that his object was to ascertain the true situation of affairs; that he had been informed, before he left the East, that there was pending or threatened litigation against the property of the appellee; that he remained in Juneau until about August 10, 1912, and went thoroughly over the situation with Mr. Winn and Mr. Tripp (Tr. Vol. IV, p. 1278); that the property was then in the hands of Mackay as receiver and that he was acquainted with the manner of raising money to carry on the work on the Ebner property (Tr. Vol. IV, p. 1279); that up to May, 1913, he had been connected with the Alaska-Ebner Gold Mines Company (formerly the California-Nevada Copper Company), and with the officers of that company, both in Juneau and in the East; that

he learned about the title and the number of suits which had been commenced or were threatened, and found out that some parts of the property (meaning appellee's property) were in controversy between the Ebner Company (appellee) and the Alaska Juneau Company (appellant) (Tr. Vol. IV, p. 1281); and that these matters were decided obstacles in the way of raising money (Tr. Vol. IV, p. 1282). He stated further:

“At that time, or at practically all of the times since we have been raising money for this project, we have been confronted by all of our prospective purchasers with the question of title, or of lawsuits that were pending in Juneau with relation to water rights, and with relation to patented claims, which had been brought to our attention most forcibly; I remember a large banking house, Barauch Brothers, with whom I was in direct communication, and then another, Harley Larned of New York—in all instances it has been largely discussed there, particularly through banking circles, and it certainly interfered with the obtaining of money” (Tr. Vol. IV, p. 1282).

John R. Winn, an attorney at law, was called on behalf of appellee; his testimony covers from page 1218 to 1275 of Volume IV of the record. A large portion of it is directed toward the trouble, lawsuits, litigation, and the clouding of the title to the property of appellee by appellant during the time of the progress of the work. He showed that the names and titles of the cases brought in the District Court for the District of Alaska, at Juneau, between the two companies, appellant and appellee, concerning the property of appellee, are as follows:

No. 803, Ebner Gold Mining Company against The Alaska-Juneau Gold Mining Company;

No. 804, Tripp against The Alaska-Juneau Gold Mining Company;

No. 812, The Alaska-Juneau Gold Mining Company against Angus Mackay, et al.;

No. 823, The Alaska-Juneau Gold Mining Company against the California-Nevada Copper Company and the Ebner Gold Mining Company;

No. 826, The Alaska-Juneau Gold Mining Company against the Ebner Gold Mining Company;

No. 828, The Alaska-Juneau Gold Mining Company against the Ebner Gold Mining Company, et al.;

No. 835, the appealed case, and is the Ebner Gold Mining Company against The Alaska-Juneau Gold Mining Company;

No. 938, The Alaska-Juneau Gold Mining Company against the Ebner Gold Mining Company;

No. 939, The Alaska-Juneau Gold Mining Company against the Ebner Gold Mining Company (Tr. Vol. IV, p. 1254).

The witness further testified, in substance:

I was dealing with the people back there (meaning New York) who were interested in it and who were raising the money. It was by reason of the conditions of the property that I went back to New York and while back there ascertained that these law suits prevented the raising of the money to carry on the work (Tr. Vol. IV, p. 1226). Money was sloughing off and he (referring to Mackay) was working with a small crew of men after the 1st of January, 1911, and he was experiencing difficulties in meeting his payrolls (Tr. Vol. IV, p. 1244).

In March, 1911, I went to Boston to see if we couldn't convince these people that these law suits were not so serious, nothing to be scary over, and their whole remark was that they wouldn't have anything to do with it. They were trying to

sell bonds of the California-Nevada Copper Company. Some were sold. They sent for me to go back there in March, 1911, to see if I could not convince these people there that these suits were not so scary as the news had been circulated; we had meetings with prospective buyers, and with parties who wanted to know whether the suits were real or not. You cannot go on the market and get money when there is a scare on (Tr. Vol. IV, p. 1245).

He added that it was both litigation and the clouding of the title that caused the trouble. Claims had been filed over the property of appellee and they clouded the title and, of course, it was a difficult matter to raise money when the title was clouded and suits were pending (Tr. Vol. IV, pp. 1273, 1274).

We have not burdened the court with giving the nature of these several suits or the subject matter of the litigation. We desire, however, to call attention to one case in particular, which was more instrumental in preventing the raising of money to proceed with Mackay's work, than perhaps all the other suits combined. The case is No. 835a of the District Court of Alaska. The entire proceedings in that case are set up in the reply of the appellant, commencing at page 62 of Volume I of the Transcript. This suit was brought by the appellee to eject the appellant from the Lotta and Parish lode claims, constituting a part of appellee's property. The appellant claimed the same property under a lode location, under the name of "Oregon", made by J. P. Corbus in 1899, the same property having been relocated for appellant by one Datson on July 20, 1910; and under another

claim called the Canyon, located for appellant in October, 1910.

Bradley, the president of appellant, testified that he knew that his company had forfeited the Oregon lode claim, as located by Corbus in 1899, but that it was relocated for appellant by Datson on July 20, 1910 (Tr. Vol. I, pp. 371, 372, 373). In other words, appellant had forfeited the Corbus location by failure to keep up the assessment work and relocated it again July 20, 1910.

The Oregon claim and the Canyon claim overlapped or covered almost all of the surface ground of the Parish No. 2 and the Lotta claim of appellee (Tr. Vol. III, pp. 1062, 1063). Upon the trial of Cause 835a, the lower court decided that the Oregon claim was located by appellant for convenience sake, and that the discovery on the Canyon claim was made on the Lotta claim, and hence both locations were invalid. But the clouding of the title to the property of appellee by these two claims absolutely put an end to the raising of money by Mackay, and hence caused the delay in the progress of the work of appellee, which was not resumed until May or June of 1913. The court below found that, under these circumstances, appellee had prosecuted its work with diligence. And, we submit, no showing has been made which would warrant this court in disturbing that finding.

SIXTH.

THE RESUMPTION OF THE WORK BY MUIR AND MACKAY.

The work to carry out the plans of opening up and mining the property on a larger scale was resumed by Mackay in May or June, 1913.

Regarding the installation of the new air compressor at Shady Bend, near the portal of the new tunnel, Mackay testified that the capacity of the compressor is 1950 cubic feet of air per minute; *that he commenced the installation and erection of the same on the property in May or June of 1913, and in August, 1913, the water was applied through the new high line flume for driving or running of the compressor* (Tr. Vol. II, pp. 705, 706). This testimony shows the inaccuracy of the statement of appellant (Brief, p. 15) that the water was first applied on December 17, 1913.

The circumstances, under which the resumption of work took place, were as follows: The California-Nevada Copper Company, afterwards known as The Alaska-Ebner Gold Mines Company, had given a mortgage to the Standard Trust Company of New York and Edward M. F. Miller. All of the shares of stock of the appellee were afterwards bought by the copper company, and, by reason of a clause in the mortgage as heretofore mentioned, became subject to the terms of the mortgage given to the trust company. There was a foreclosure of the mortgage and the stock of the appellee was sold (Tr. Vol. IV, pp. 1228, 1229, 1230). This stock was bought in by one Chapman and his associates (Tr. Vol. IV, p. 1229).

The testimony of John R. Winn shows that Chapman and his associates, or the "Chapman Committee on Reorganization", was raising money in New York through the Smelting Company (meaning the United States Smelting, Refining & Mining Exploration Company) (Tr. Vol. IV, p. 1236 and p. 1240).

It appears from the testimony of Downie D. Muir that the United States Smelting, Refining and Mining Exploration Company obtained an option on the Ebner property (meaning the shares of stock of appellee) from the "Chapman Committee" of New York or Boston, which purchased the property at the foreclosure sale early in the spring of 1913 (Tr. Vol. III, p. 1164).

Of course, the only property which was sold under the foreclosure of the mortgage were the shares of stock of the appellee, as the California-Nevada Copper Company had mortgaged the same to the Standard Trust Company (Tr. Vol. IV, p. 1230).

Muir was the agent and representative of the United States Smelting, Refining and Mining Exploration Company, and was first in Juneau in 1911, but had nothing to do with the appellee's property until in July, 1913. He went upon the property at that time at Shady Bend, and he testified that the new air compressor had then been installed and the compressor house built near the mouth of the tunnel. From that time on, until the trial of the case, Muir was connected with and represented his company, and he and Mackay carried on the work on appellee's property (Mackay then being receiver) from the 28th day of July, 1913, to the time of the trial of the case, and Muir was continuing it at that

time (Tr. Vol. III, pp. 1130, 1131). The money for the work was furnished by the United States Smelting, Refining and Mining Exploration Company, the optionee of all of the shares of stock of appellee.

At the time Muir commenced work with Mackay, in July, 1913, there had been driven 1173 feet of tunnel. In August, 1913, the water through the new flume was applied to the air compressor, and the power for driving the new tunnel and ventilating it was generated at the new air compressor plant, at Shady Bend on the Cape Horn No. 2 claim. Up to the time of the trial, Muir had done underground work in the way of drifts, tunneling, crosscuts and raises, to the extent of 4,400 feet in addition to what Mackay had done, and the work was going on with about 100 men (Tr. Vol. III, pp. 1131, 1132, 1133).

Muir further testified that, within a year from the time of the trial, the appellee would need the water to the full capacity of the new flume and that eventually it would need more water than the flume carried (Tr. Vol. III, p. 1134).

Shortly after July, 1913, after Muir had commenced the work with Mackay, a 5-stamp mill was erected at Shady Bend; it is marked "Mill" on defendant's exhibit "S". The 5-stamp mill was erected for experimental purposes to sample the ore taken from the mine. The reason they had not erected a larger stamp mill, prior to the trial of this case, was that it was impossible in the few months' time to arrive at any conclusion, mineralogically or otherwise, on the ore which they had

developed. Muir stated upon his examination that they had not arrived at the stage, to know what size stamp mill or what kind of machinery they would need in handling the ore bodies on the property. The witness then explained the kind of ore bodies, which had been discovered and developed (Tr. Vol. III, pp. 1136, 1137).

Ebner, testifying on this same subject, stated that, after he had made a full examination of the property, just prior to the trial, he found that the ore bodies had been developed to such an extent that it would justify the erection of a mill of a capacity sufficient to handle 1000 tons of ore per day (Tr. Vol. III, p. 1128).

It appears from the record that the appellee used the water continuously through its new flume from August, 1913, until January, 1914, and applied it to the air compressor, ventilation of the mine, and to such other purposes as were necessary in the progress of the work. It had, however, not used the water to the full capacity of its flume at any time, for the reason that the development of its work up to the time of the trial of the case, as testified to by Mr. Muir, had not justified the use of that amount of water. But in January, 1914, by reason of cold weather, the water had become low in Gold Creek, and at that time appellee was using all of the water obtainable at its intake at the Ebner dam, and it was at this time that appellant brought this suit. The appellee's work had progressed from time to time and it had, as the necessity arose, taken additional amounts of water out of Gold Creek; it had carried on all of the improvements, and had done all of the work, which has been testified to in this case; and yet, while

appellant knew very well that in cold weather there would be a shortage of water, it stood by, saw these improvements made at an expenditure of large amounts of money by appellee, and made no protest or complaint. It surely, under this showing, is in no position to seek relief in a court of equity.

See:

Cobb v. Smith, 16 Wis. 692;

Wood v. Railroad Co., 68 Ga. 539;

Pomeroy's Eq. Jur., Vol. II, sec. 817.

From the foregoing, we submit, that it abundantly appears that the trial court was fully justified in its finding that appellee had at all times prosecuted its work with diligence.

Thus far we have shown:

(a) That William M. Ebner in 1908 sold all of his shares of stock in appellee, which was a large majority, to Underwood; that Ebner had theretofore been president, superintendent and general manager of all the property of appellee, and that Underwood virtually stepped into Ebner's shoes and commenced directing the affairs of appellee;

(b) That the California-Nevada Copper Company, afterwards called The Alaska-Ebner Gold Mines Company, bought out or succeeded to Underwood's interest in the shares of stock of appellee, which had been transferred to him by Ebner, and that the California-Nevada Copper Company eventually became owner of all of the stock of appellee;

(c) That the California-Nevada Copper Company mortgaged all of the shares of stock of appellee to the Standard Trust Company of New York and Edward M. F. Miller, trustees, and that there was a foreclosure of this mortgage by the Trust Company, and all of the shares of stock of the appellee were purchased by one Chapman, or the Chapman committee;

(d) That Tripp was employed by Underwood and his successor, the California-Nevada Copper Company, after Underwood and the latter company had become the owner of the large majority of the shares of stock of appellee, and that Tripp was sent upon the property of appellee to ascertain and submit plans for the opening up and working of its property, on a larger scale than it had theretofore been operated; that Tripp finally decided upon the method of opening up and working the property which had theretofore been adopted by Ebner, and that, at the time that Tripp posted his water location notice, the appellee was the owner of all of the property necessary for the contemplated project and that Tripp commenced the work of carrying out this project;

(e) That Tripp quit the service of his employer in August, 1910, and Mackay was employed by Underwood and the California-Nevada Copper Company to proceed with the work, which had been commenced by Tripp; and that Mackay pursued this work with diligence and had possession of the property of appellee, from the time that he commenced his services in 1910, down to the trial of this case;

(f) That Downie D. Muir, representing the United States Smelting, Refining and Mining Exploration Company, (which said company was the optionee of all of the shares of stock of appellee), in 1913, together with Mackay, pursued this same work, which had been originally planned by Ebner, commenced by Tripp and followed by Mackay, down to the time of the trial of this case; and that all of the work, looking toward the appropriation and application of the water of Gold Creek to mining and milling purposes, was done under the Tripp notice.

SEVENTH.

THE APPELLANT COMMITTED A TRESPASS WHEN IT POSTED THE MULLIGAN NOTICE AND CONSTRUCTED ITS DAM ON THE LOTTA PATENTED CLAIM OF APPELLEE AND NO RIGHTS WERE INITIATED THEREUNDER. ANY WORK CLAIMED TO HAVE BEEN DONE UNDER MULLIGAN'S LOCATION NOTICE WAS OF NO FORCE OR EFFECT AND COULD NOT AFFECT THE RIGHTS OF APPELLEE.

It is the contention of the appellee that appellant committed a trespass upon the property of the appellee when it posted the Mulligan notice and constructed its dam on the Lotta patented claim of the appellee and that no rights in its favor were thereby initiated.

The trespass by appellant upon the property of appellee was made an issue by the pleadings, and a large amount of evidence was offered thereon by both parties. We have divided the subject into several parts, to which we respectfully ask the court's attention.

1. The court below determined that the acts of appellant constituted trespass.

While there may not be any specific findings of the trial court upon this trespass issue, yet we submit, the general findings, conclusions and decree of the lower court are broad enough to cover this matter.

Conclusion No. 1 of the trial court is:

“That as against the plaintiff (appellant) the defendant (appellee) is the owner of and entitled to the first use of 10,000 miners’ inches of water to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted” (Tr. Vol. VII, p. 2674).

Conclusion III of the trial court is as follows:

“That the plaintiff (appellant) is not entitled to the relief asked for or to any relief” (Tr. Vol. VII, p. 2676).

The decree of the trial court is found in Volume VII of the record, at pages 2678 and 2679. The decree adjudges:

“1. That the plaintiff (appellant) herein take nothing by reason of its complaint;

2. As against the plaintiff herein (appellant) the defendant, the Ebner-Gold Mining Company (appellee) is entitled to the first and paramount use of the water of Gold Creek to the extent of 10,000 miners’ inches of water, if so much be in said creek, and be useful or necessary for defendant’s use or uses for mining and milling purposes, or any other beneficial purpose; to be taken from the said creek where said defendant’s (appellee’s) dam is constructed, to wit: near the lower boundary line of and on defendant’s (appellee’s) patented lode claim known as the ‘Golden Fleece’ * * *

In other words, the trial court has decided all of the issues raised by the pleadings in favor of appellee. From the foregoing conclusions and decree, we contend, it necessarily follows, that the court below impliedly, at any rate, determined that the posting of the Mulligan notice on the Lotta claim and the building of the dam, in the first instance, upon that claim by appellant, were trespasses, and that no rights in its favor were initiated thereby. The conclusions and decree of the court below deny the efficacy of each and every step which appellant took looking toward the appropriation of the water of Gold Creek to beneficial use. Each and all of these steps, taken by appellant, to establish its asserted rights, are set up in appellant's complaint and reply, and the trial court concludes:

“That the plaintiff (appellant) is not entitled to the relief asked for or to any relief.”

Further—

“That the plaintiff (appellant) herein take nothing by reason of its complaint.”

This is tantamount to a general finding against any and all claims made by appellant to the water of Gold Creek.

2. The evidence conclusively shows that appellant's claim under the Mulligan notice is founded upon trespass.

Irrespective, however, of the correctness of our contention regarding the effect of the conclusions, findings and decree of the trial court, the evidence, we think, compels the conclusion that the appellant, in making its

attempted appropriation of the water of Gold Creek, was a trespasser.

Appellant states in its brief, with regard to its action in posting the Mulligan notice on the patented Lotta claim:

“The most that can be made of it is that a mistake was made owing to the confusion and uncertainty at the time the notice was posted, and through an inadvertence the precise place where the notice was posted turned out to be on the ‘Lotta’ patented claim. No claim of right was asserted to the land on which the notice was posted” (Brief, p. 50).

This comment can avail appellant nothing, because the very matter here under discussion had been adjudicated between appellant and appellee in a prior case, wherein it was determined, by both this court and the trial court, that the entrance upon the Lotta patented claim by appellant, for the purpose of appropriating the waters of Gold Creek, was wrongful and constituted a wilful trespass.

Appellant set up in its reply the findings of fact, conclusions of law and judgment in Cause No. 835a, wherein the appellee in this case was plaintiff, and the appellant was defendant (Tr. Vol. I, p. 62). That case has been heretofore mentioned; it was a suit in ejectment for the recovery of possession by appellee of the patented Lotta lode mining claim, and Parish No. 2 unpatented lode claim (Tr. Vol. I, p. 62). The appellant filed its answer in No. 835a, and averred that it was the owner of a mining claim located by one J. P. Corbus in the month of October, 1899, known as the Oregon mining

claim; also that it was the owner of a lode mining claim, located July 20, 1910, by one R. G. Datson, which lode claim was likewise designated and named the Oregon lode mining claim; and further, that it was the owner of another mining claim known as the Canyon vein or lode claim, located by one W. R. Lindsey on the 8th day of October, 1910. Appellant also alleged in this answer that the work, which it was doing on the ground, then in its possession, was within the boundary lines of the Oregon and Canyon lode claims. At that time, appellant was building its flume line over the Parish No. 2, and its dam upon the Lotta, claiming the right to enter thereon by reason of the Mulligan notice and of its asserted ownership of the foregoing Oregon and Canyon claims. It has also been shown by Wettrick's testimony that the Corbus Oregon claim and the Datson Oregon claim, above referred to, covered practically the same ground and lapped over on to the Lotta patented claim, and that the Canyon lode claim, located by Lindsey, also took up the greater portion of the Lotta and some portions of the Parish No. 2 (Tr. Vol. III, pp. 1062, 1063, and exhibit, Tr. Vol. VI, p. 2220). (See, also, Kinzie's testimony, that the two Oregon claims are the same, Tr. Vol. I, p. 312.)

We further call to the court's attention that the location of the Oregon claim by Datson was made on July 20, 1910, and the Mulligan notice was posted on August 1, 1910, and the place, where the Mulligan notice was posted, was on what the appellant asserted to be its Oregon lode claim; hence, *at the time of the posting of the Mulligan notice, the appellant was claiming an*

interest in the land or ground of the Lotta claim, and this, under all the authorities, made the entry of the appellant upon the Lotta claim and the posting of the Mulligan notice thereon, a trespass.

In Cause No. 835a, the trial court made the following finding, regarding the Lotta lode claim:

“That while plaintiff (appellee here) was the owner of such mining claim (“Lotta”) and seized and possessed thereof, the defendant (appellant here), early in August, 1910, without right or title, entered into possession of part of said Lotta mining claim and without right or title thereafter constructed thereon a portion of a certain dam, with structures accessory thereto, for the purpose of diverting the waters of Gold Creek flowing in, through and over said Lotta lode mining claim, and ousted and ejected plaintiff therefrom, and now wrongfully and unlawfully withholds the possession thereof from the plaintiff (appellee)” (Tr. Vol. I, p. 123).

The court further found in that case:

“The court further finds that the Oregon mining claims referred to in defendant’s answer as located by J. P. Corbus and the Oregon mining claim as located by R. G. Datson were each made solely for the purposes of convenience; that no discovery of mineral-bearing rock in place, of any value, was ever made by the defendant or its grantors, or at all, on either of said claims, nor any indication or evidence of such as would warrant or justify one in spending time, work or money in the development of either of such claims or with the expectation of finding ore” (Tr. Vol. I, p. 126).

The court concluded in that case:

“1. That the plaintiff (appellee) is entitled to the possession of the Lotta mining claim and is the

owner thereof as staked upon the ground and described in plaintiff's (appellee's) amended complaint, and is entitled to a decree ousting the defendant (appellant) therefrom.

"2. That the plaintiff (appellee) is entitled to a writ of restitution and a writ of ejectment herein restoring the plaintiff (appellee) to the possession of the Lotta patented claim as more particularly set out in the findings of fact herein * * *" (Tr. Vol. I, p 126).

With respect to the Canyon claim, the court in that case made a finding as follows:

"The court further finds that the Canyon mining claim is based upon a discovery within the boundary of the Lotta patented mining claim above described, and that said location is void and without effect."

A decree was entered in that cause accordingly, as will appear from appellant's reply in the case at bar (Tr. Vol. I, p. 128). That case was afterwards appealed to this court and the judgment of the lower court affirmed (210 Fed. 599).

Under the proceedings above set forth, the appellant in this case was adjudged to be a trespasser *when it entered upon the Lotta patented claim, either to post the Mulligan notice or to build its dam*. And the judgment in the former case is, admittedly, *res adjudicata* in this case.

That the rights claimed by appellant under the Mulligan notice, contemplated a trespass in the attempted exercise of them appears from the face of the notice. In that notice, appellant claimed the right to *build a flume or ditch over the Lotta claim*. A portion of

the Mulligan notice, which was posted on the Lotta claim, reads as follows:

“Said water to be diverted from said creek at a point indicated by this notice posted on a tree and about one mile from the mouth of the said Gold Creek; said water is to be diverted by ditch, pipe or flume” (Tr. Vol. V, p. 1959).

Thus, the appellant was claiming an easement over the Lotta patented claim and a sufficient amount of the surface ground thereof for a ditch or a flume.

The witness Wettrick stated that the appellant also had put some troughs or small pieces of flume upon the Lotta claim, just below where the Mulligan notice was posted. This clearly showed the intention of the appellant to cross the Lotta claim with its flume, pipe or ditch line and to thereby commit a trespass thereon (Tr. Vol. II, p. 649).

3. Appellant, at the time the Mulligan notice was posted, well knew that it was committing trespass.

It cannot be disputed, we think, that the trespass of appellant could initiate no rights on its part, even if it was done under a mistake. But the evidence conclusively shows that the trespass was knowingly and wilfully committed.

Bradley, the president of the appellant, testified that, in the year 1910, he went to Juneau just a little in advance of what has been referred to in this brief as the “Bent” party, and that he knew what Bent and his people were going to do on the property of appellee (Tr. Vol. I, p. 375). Bradley claimed that he arrived in Juneau some time in July, and that he discovered

that the Oregon claim, above referred to, as located by Corbus in 1899, had been forfeited by reason of the non-performance of the necessary annual assessment work (Tr. Vol. I, pp. 371, 372, 373); that he then had Datson go and relocate the Oregon claim on July 20, 1910, for the appellant, after it had allowed the same to be forfeited and to revert to the Government under the Corbus location. Then, presumably, becoming uneasy about the legality of the Oregon location, in October, 1910, he caused the location of the Canyon claim to be made.

Again, to show that the appellant had for a long time known the boundaries of the Lotta lode claim, we direct attention to appellant's exhibit No. 38, found at page 2003, Vol. V of the record, which is a report on appellee's property. This report was brought to the notice of McDonald, who was then the superintendent of the Treadwell Gold Mining Company, as well as of the appellant. He was acting for Bradley, who was at that time and now is the president of the appellant. There was an examination made of this property by McDonald, as the representative of Bradley (Tr. Vol. IV, p. 1628), and Bradley and Kinzie examined the property of appellee. The date of this report is June 1, 1901. Under the heading of "Property", in this instrument, it is stated that the property consists of seven patented lode claims, two unpatented lode claims, and one unpatented placer claim. It has been shown, and is conceded, that the patented property that belonged to the appellee, as far back and prior to 1901, the

date of the above report, consisted of the Lotta and several other claims, making up the seven.

On page 2007 of Vol. V of the record there is a paragraph in this report as follows:

“The title to all the water running in Gold Creek is absolutely vested in this company (meaning appellee). The quantity of the water for eight months in the year is at least 4,000 miners’ inches. The lowest stage of water in the last six years at any time during the coldest weather has been 740 miners’ inches.”

This report, therefore, conveyed absolute notice to appellant that appellee was claiming all the water of Gold Creek for mining and milling purposes as far back as 1901, the date of the report.

To show that appellant as far back as 1909, while Tripp was working for appellee, knew of the boundary line of the Lotta and Parish Nos. 1 and 2 claims, we call attention to a deed made by appellant to appellee conveying to appellee all that part of the Colorado patented claim which was in conflict with the Parish No. 1 unpatented claim of appellee (see Deed, Tr. Vol. VI, p. 2298).

Surely, it is not reasonable to suppose that leading mining men like Bradley, McDonald and Kinzie would take an option upon mining property and examine the same to ascertain its value, without knowing its boundary lines. The irresistible conclusion is that all of the representatives and agents of appellant knew of the boundary lines of the Lotta claim as far back as 1901. Appellant, however, to relieve itself from the charge

that it was a wilful trespasser, now says that the lower boundary was confused and uncertain.

But, we invite the court's attention to the following evidence to show that the boundary lines of the Lotta claim, and especially the lower side line, had at all times been kept cleared out, and the monuments retained thereon, and that appellant undoubtedly knew that it was trespassing upon the Lotta claim.

Ebner states that he had the side line of the Lotta claim brushed out in 1893 (Tr. Vol. III, p. 1098); at that time he saw the corner posts and monuments, and he pointed them out on appellee's exhibit "S"; he remembered that the posts were marked "Survey No. 87", which is the number of the survey of the Lotta claim (Tr. Vol. III, p. 1099). He further testified about keeping this lower side line of the Lotta brushed out and maintaining the monuments thereon down to 1908, when he sold out. In 1908 he was on this property with Hill & Wettrick, and had the lower side line of the Lotta brushed out at that time (Tr. Vol. III, p. 1102). He also saw the same corner posts and monuments there in 1908.

Several exhibits were identified by the witness as being photographs of the corner posts that were there in 1908; these exhibits were offered in evidence, and are in the record. The witness further stated that he was upon this property again in 1910 and saw the stakes and monuments on the ground, which had always been there (Tr. Vol. III, pp. 1106-7).

The witness Wettrick pointed out the corner posts which were on the property in 1908 and marked them on appellee's exhibit "S" by a red circle (Tr. Vol. II, pp. 603-4); and he knew about the brushing out of the lower side line of the Lotta in 1908 by Ebner, and described the thorough manner in which it was done (Tr. Vol. II, p. 613). He stated that the corner posts which he found there were the same as testified to by Ebner (Tr. Vol. II, p. 614). Wettrick was on the premises again in 1910 and noticed that the lower side line of the Lotta claim could very easily be seen and was very easily discernible by reason of having been cleared in 1908 (Tr. Vol. II, pp. 615, 616); he set the stakes, under the decision of Judge Cushman, in exactly the same place where they had always been (Tr. Vol. II, p. 617). In reply to questions by the trial court the witness (Tr. Vol. III, p. 1175) testified that in the trial of Cause No. 835a, Judge Cushman placed the lower side line of the Lotta claim just where appellee has always contended it was, according to the stakes and monuments above referred to, and along the lines where it has been brushed out, as testified to by the witnesses above mentioned.

Oscar Harri, the keeper of appellee's property, and who resided on the property at the old mill, from the time that Ebner sold out, in 1908, until Tripp took possession of the property, and who, for many years past, had been in the employ of Ebner and knew the boundaries of the property, stated that this lower side line of the Lotta had always been kept brushed out and was plain to be seen (Tr. Vol. III, pp. 839, 843).

Tripp also corroborated the testimony of the other witnesses who testified on this subject (Tr. Vol. II, p. 517).

It thus is made clear by the evidence that appellant must have well known that its attempt to appropriate the waters of Gold Creek on the Lotta claim was a trespass. But, we submit, even if it had made an honest mistake in seeking to appropriate the water of Gold Creek by entering upon the Lotta claim it nevertheless committed a trespass under which no rights could accrue to it.

4. The work done by appellant, and upon which it predicates its asserted right to the waters of Gold Creek, was done upon appellee's property, and was a trespass.

It is claimed by appellant that it commenced building its dam on the 3rd day of October, 1910, and that appellee's employees rolled rocks down and broke out a temporary dam which was put in on that date, and that appellant had some of the employees of appellee arrested. It may be true that some of the over-zealous employees of appellee may have gone a little too far in protecting its property by resisting invaders and trespassers, who were determined to go on the Lotta claim and erect a dam, and were arrested. But, it is also shown in the evidence that, while these employees of appellee were under arrest, and in the nighttime on the 3rd of October, 1910, the so-called temporary dam of the appellant was put in the creek.

In connection with this matter, we call attention to some further testimony upon this invasion by appellant of the rights of appellee.

Fred Radel testified that he helped to build a fence some time in September, 1910, prior to this invasion of the appellant, and that this fence was built across a road, which led from the regular traveled Basin road to the air compressor of appellee, on the Lotta claim; that there was placed upon that fence a trespass notice warning people to keep off of the property of appellee; that this notice was there on October 3rd, when appellant undertook to put in the temporary dam (Tr. Vol. II, pp. 582, 583). The testimony of Radel is corroborated by that of Mackay, Wettrick and other witnesses.

The witness further testified that after the fence was built he was up there and saw three or four men coming through the brush; that he had had orders from Mackay, if anyone came on the property to report it; this the witness did, and he also reported it to Black, who was foreman of appellee. Black and the witness then went up to investigate, and Hunsaker went down by the compressor (meaning appellee's compressor on the Lotta claim), and there were three men (employees of appellant) working there. Hunsaker told them that they were on patented ground, and that they would have to leave. One of the men ordered off was Henderson, one of the foremen of the appellant (Tr. Vol. II, p. 584).

It is a conceded fact in the case, that the point where the appellee undertook to put in a piece of flume and to build a dam on October 3, 1910, was just below the fence that Radel had built and on which was posted the foregoing trespass notice.

The appellant claims (Brief, p. 9) that,

“On October 3rd, 1910, the Alaska-Juneau dam was completed, flume started, and the water turned in.

“On the night of October 3rd the flume was crushed by blasting and rolling down rocks and blasting was continued on October 4th.”

But, this dam was placed upon appellee's property; it was put there on October 3, 1910, at the time that Al. Black and Mackay and some others were arrested. Upon this subject we call attention to the following testimony:

John Carlson stated that he was employed by Mackay, and that on the 3rd day of October he was running an open cut on the Lotta claim; that on the same day he saw the Alaska-Juneau people (appellant) working down in the creek *above where they afterwards built their dam* (Tr. Vol. II, pp. 738, 739); that this work which was being done at that time, was above the dam, as it was constructed at the time that the case was tried before Judge Cushman in May, 1911 (Tr. Vol. II, p. 740); that, at this time, appellant put a box in the creek, about 3 x 4 and about 14 feet long, about fifty feet above where the present dam is; the box was sunk into the water and the water went into one end of the flume, in the bed of the creek, and came out the other end of the flume, in the bed of the creek (Tr. Vol. II, p. 741). The witness further stated that the dam, which the appellant claimed it had built on the 3rd of October, 1910, consisted of two logs or poles, placed across the creek for foot logs (Tr. Vol. II, p. 755); and that these logs

were above where the dam was afterwards constructed, on the property of appellee (Tr. Vol. II, pp. 754, 755).

Al. Graham, another witness, testified that he was doing assessment work on the Parish No. 2 lode claim on the 3rd day of October, 1910, and corroborates the testimony of the witness Carlson (Tr. Vol. II. pp. 774-780).

Al. Black corroborates Graham and Carlson (Tr. Vol. III, pp. 801, 802; also, p. 813).

Dan Riordan, with respect to this subject, corroborates the witnesses Carlson, Black and Graham (Tr. Vol. III, p. 821).

It has been shown conclusively that on June 11, 1911, when Judge Cushman tried Cause No. 835a, the dam had been constructed to a large extent upon the Lotta claim and was diverting water from that claim to appellant's flume. It also appears that, all of the work which had been done by appellant on October 3, 1910, in the bed of Gold Creek, was above where the dam was constructed, and on the Lotta claim. This, then, was a forcible entry upon the land of appellee and a wilful trespass, and the work done gave appellant no rights to the waters of Gold Creek.

The work consisted of putting two or three poles across the creek, to be used as foot logs, and the floating of a piece of flume in the bed of the creek, above the present dam, and, as above stated, letting the water run through one end of the flume in the bed of the creek and out the other end of the flume in the bed of the creek. This is what appellant refers to in its brief,

on page 9, as its dam that was constructed on October 3, 1910. But Judge Lindley, in his oral argument, did not seriously insist that the term "dam" could be applied to these two logs thrown into the creek.

It was out of this work, which appellant was doing and which appellee resisted, that an arrest was made of Mackay, appellee's superintendent of the work, and Al. Black, its foreman. Al. Black states in his testimony (Tr. Vol. III, p. 811), that this box was put in the creek by appellant and the work was done there, while they were under arrest. They were arrested for trying to prevent appellant's employees from doing work on the Lotta claim.

John Carlson testified that he saw the box put in the creek between 8 and 9 o'clock in the evening of October 3, 1910, by employees of appellant and that appellant had a few men working there, but he did not know how many (Tr. Vol. II, p. 756).

At 8 or 9 o'clock in the evening of October 3rd of any year at Juneau it is dark. Hence, it appears that appellant, while it had under arrest appellee's foreman and superintendent of the work, went back in the night-time and tried to get whatever advantage it could, in the way of pretending to divert the water of Gold Creek upon appellee's land.

5. The work done by appellant on the Parish No. 2 claim gave appellant no rights.

In connection with our contention that the work done by appellant on the Parish No. 2 claim gave it no rights, we again call attention to the status of the rights of

appellant and appellee, to the property embraced in the Lotta patented claim and in the Parish No. 2 lode claim, at the time of the posting of the Mulligan notice on the Lotta claim and of the work done by appellant.

It has been shown that the Lotta patented claim is one of the oldest patented claims in Alaska; that the Parish No. 2 unpatented claim was taken up for appellee, a long time prior to 1910; that appellee had had the same surveyed for patent; that this claim lies alongside the Lotta and they have a common side line, the lower side line of the Lotta being the upper side line of the Parish No. 2 claim.

The Parish No. 2 lode claim was a valid outstanding location or lode claim during the year 1910, at the time that the Mulligan notice was posted and at the time that the appellant was building its flume line across the same. Not until this court's decision in Cause No. 835a, rendered the 5th day of January, 1914 (210 Fed. 599), was appellant in any position to undertake, without the consent of appellee, to go upon the unpatented Parish No. 2 claim. Judge Cushman held that appellee had performed assessment work on the Parish No. 2 claim for the years of 1909 and 1910. This holding was affirmed by this court.

It is a well settled rule that one who has taken up a mining claim, staked it out, properly recorded his notice, and is doing the assessment work upon it, has the same rights to the undisturbed possession of the claim which he would have to a patented claim, as against everyone except the United States. No third person could, therefore, as against the appellee, go upon the

Parish No. 2 claim and initiate any rights thereto, at least not until the decision of this court, in Cause No 835a, on January 5, 1914.

In the case of *Nevada-Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673, at page 680, it is said:

“But no right upon any government land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by forcible, fraudulent, surreptitious or clandestine entry thereon.”

In *Thallman v. Thomas*, 111 Fed. 278, 279, the court said:

“A valid claim to unappropriated public land cannot be instituted while it is in the possession of another, nor can such a claim be initiated by forcible or fraudulent entry upon land in possession of one who has no right either to the possession or the title.”

See, also,

Belk v. Meagher, 104 U. S. 279;

Cosmos Exploration Co. v. Gray Eagle Oil Co.,
104 Fed. 46 (affirmed in 112 Fed. 17);

Empire State Idaho Mining & D. Co. v. Bunker Hill & S. Min. & C. Co., 114 Fed. 419;

Lindley on Mines, Vol. I, sec. 217.

6. Appellant claimed ownership of appellee's property.

Bradley, the president of the appellant, preceding Bent to Juneau, in July, 1910, ascertained that a claim, which his company had located by J. P. Corbus in 1899, known as the Oregon, had been forfeited by the non-performance of assessment work. This claim, as has been shown by the testimony of Wettrick and by the

exhibit referred to herein, as it was located by Corbus, covered a large portion of the Parish No. 2 and of the Lotta claim. Appellant, in 1910, finding its Oregon claim had reverted to the Government, had to make some claim or other to the ground covered by the Lotta, and to a portion of the ground covered by the Parish No. 2, over which to run the water of Gold Creek for its use. On July 20, 1910, appellant therefore directed one Datson to go on the Lotta and Parish No. 2 claims and re-locate for appellant the old Oregon claim, which had been forfeited. Datson did so, and the claim was again named "Oregon".

It has been shown that the exterior boundary lines of these two Oregon claims were practically the same. Then, on August 1, 1910, appellant claims that it had Mulligan post his notice of appropriation. It is conceded by appellant that this notice was posted on the Lotta claim. In its brief, at page 49, referring to the Mulligan notice, appellant says:

"This notice was posted at a point a short distance north, 150 feet, of where the Alaska-Juneau dam was subsequently constructed. This point was determined by the District Court of Alaska in litigation between these parties to be on the patented 'Lotta' claim belonging to the Ebner Company."

At page 50 of its brief, appellant states, with reference to this matter:

"The most that can be made of it is that a mistake was made owing to the confusion, * * * This, however, is, we think, quite immaterial. No

claim of right was asserted to the land on which the notice was posted.”

But this assertion, that there was a mistake, and that no claim of right was asserted to the land on which the Mulligan notice was posted, is contrary to all the evidence. It has been shown, by the testimony of Wettrick and by the exhibit to which he referred, and to which we have referred in stating the preceding facts, that this Oregon claim, located by Datson for appellant, covered that part of the Lotta claim upon which the Mulligan notice was posted, and that appellant has been strenuously trying, by law suits, to establish its title to all of that portion of the Lotta claim which was embraced within the boundary lines of the Oregon claim. It declared in Suit No. 835a that both the Corbus and the Datson Oregon claims were valid outstanding locations, and up to the trial of that case it was asserting title under these two locations. But the court held that both locations were invalid.

It has further been shown that another claim, called the Canyon, was located for appellant, in October, 1910, over the Lotta claim, and embraced within its boundary lines the place where the Mulligan notice was posted. This claim likewise was decided by the court in No. 835a to be invalid, because the discovery was made on the Lotta claim. Appellant cannot, therefore, support its assertion that *no claim was made by it to the ground upon which Mulligan posted his notice*. This ground was covered by appellant's two claims, Oregon and Canyon.

7. The posting of the Mulligan notice, on the Lotta claim, itself constituted a trespass.

The Mulligan notice contained the clause, "Said water is to be diverted by ditch, pipe and flume". In other words, *appellant was seeking an easement across the patented claim, or seeking to take and occupy so much of the Lotta claim as its ditch, pipe or flume line would occupy.*

Then, too, Wettrick testified, as we have shown, that the defendant put some troughs on the Lotta claim, attempting to take the water off the same.

There can, we submit, be no question that appellant was a wilful trespasser on the property of appellee. This was determined by Judge Cushman in his findings and decision in No. 835a. Furthermore, the testimony clearly shows that the lower side line of the Lotta claim was kept constantly brushed out, and that, prior to 1910, Bradley and his representative McDonald, and Kinzie, all were interested in an option on property of appellee, and examined the same for appellant. Again, in 1909, it has been shown that, while Kinzie was manager of appellant, and Bradley its president, they caused to be deeded to appellee a portion of the Parish No. 1 lode claim, which was in conflict with their Colorado claim. The Parish No. 1 claim lies below the Lotta and Parish No. 2. These men, who were at the head of this mining company, would, certainly, not have thus conveyed away its property, without having carefully ascertained the boundaries of the same and all of the facts connected with it.

Up to June 12, 1911, as has been conclusively shown, the dam of appellant was constructed largely upon the Lotta claim, and was shearing the water from that claim into the intake of appellant's flume. Judge Cushman declared that appellant was a trespasser in this respect, and ejected it from the Lotta claim.

The evidence shows that appellant committed a knowing and continued trespass upon the property of appellee. It had constructed its flume line from the dam on the Lotta claim down to Snowslide Gulch over the Parish No. 2 claim, a distance of between 800 and 1,000 feet, taken the water through it, and applied it to its air compressor there some time in November, 1910. All this time it was a trespasser upon the Lotta claim.

While appellant was thus engaged in the construction of its flume and in the erection of its dam, appellee had warned it to keep off the patented property; it had built a fence and put up a trespass notice and even was obliged to resort to force to keep appellant off its property. Under all these circumstances, we submit, it is not open to doubt that these acts of appellant constituted a knowing and wilful trespass upon the property of the appellee.

8. No rights in favor of appellant can be based upon the acts of trespass committed on appellee's property.

It is a well settled proposition that the right of appropriation extends only to waters upon the public domain of the United States, or upon the public lands of a state, and that one cannot acquire a water right

on land held in private ownership by another, without acquiring an easement on such land.

See:

40 Cyc., 705;

Prentice v. McKay (Mont.), 98 Pac. 1081;

Smith v. Denniff (Mont.), 60 Pac. 398;

Maguire v. Brown, 106 Cal. 660; 39 Pac. 1060;

Lewis on Eminent Domain, sec. 631;

Atherton v. Fowler, 96 U. S. 513.

The attempted location or appropriation of the waters of Gold Creek by the posting of the Mulligan notice being a trespass, and the building of the dam being also a trespass, created no rights in the appellant. The statute of the United States (Rev. Stat. U. S., secs. 2339, 2340), and applicable to Alaska, recognizes the right of an individual to acquire the use of water by appropriation; but, as said by the Supreme Court of Montana, in *Prentice v. McKay*, supra, this statute

“ * * * neither has authorized, nor indeed, could authorize, one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings”.

Wiel, in his book on “Water Rights in the Western States”, at page 244, Vol. I, concisely states the rule as follows:

“An appropriation cannot be initiated unlawfully by a trespass upon private land, and no rights can be obtained thereby against the land owner whose land is trespassed upon in any jurisdiction.”

The custom of appropriation of water to a beneficial use has been limited, under the Act of Congress, July 26, 1866, to Government lands.

Curtis v. La Grand Water Co. (Ore.), 23 Pac. 808;

Carson v. Gentner (Ore.), 52 Pac. 507.

Farnham, in his book on "Waters", Vol. III, pp. 2049, 2050, section 659, states that the statute of 1866 applies only to public lands; that it has no application to lands of individual owners and confers no right to divert the water of a stream flowing through their land; that it confers no right to enter upon the land in the possession of another, even for the purpose of completing an attempted diversion of water thereon, where the person seeking to enter had, at some previous time, manifested his intention to secure a water right thereon.

Referring to the text from Wiel, the Supreme Court of Idaho, in the case of *Marshall v. Niagara Springs Orchard Co., Ltd.*, 125 Pac. 208, at page 212, says:

"In the text the author recites the different rules that have been announced by the various decisions, and from such discussion it clearly appears that the weight of authority and better reasoning is with the proposition that an appropriation of water at a point upon private land cannot be made by trespass, and that where an attempt is made to initiate the right to appropriate the public waters of the state by trespass upon private property, such an initiation of such right is void as against the owner of the land."

To the same effect is:

Taylor v. Abbott, 103 Cal. 421; 37 Pac. 408.

In *Tobey v. Bridgewood* (Idaho), 127 Pac. 178, 180, the court had under consideration the question of the right to enter upon private lands for the purpose of initiating the right to appropriate public water. It held that, unless such right of entry was first procured by purchase or agreement with the owner, or secured through condemnation proceedings, after compensation had been made, such entry was void, and that a permit issued by the State Engineer for the right to appropriate such land had no effect.

In the case of *Snyder v. Colorado Gold Dredging Co.*, 181 Fed. 62, the Circuit Court of Appeals for the Eighth Circuit, Mr. Justice Van Devanter, then Circuit Judge, reversed an interlocutory order granting an injunction, and held that, although a patentee of a placer claim over which a ditch existed, took it subject to the easement of the ditch, as it existed at the time of the patent, the owner of the ditch had no right as against the patentee to enlarge the ditch so as to carry an increased volume of water. The court said, at page 70:

“Thus it was essential that the right to so alter the ditch and to enlarge its use be acquired through a grant from Wells or through a resort to appropriate condemnation proceedings. But as no such right was acquired, the change made in the ditch and its enlarged use were as unlawful and as much a trespass as would have been the construction and use of an entirely new ditch, in the like circumstances. And not only was the increased water appropriation initiated by means of this trespass, but the maintenance and enjoyment of that appropriation are dependent upon a continuance of the trespass. * * * The law not only looks with great disfavor upon claims which are grounded in and sustained by a trespass, but re-

guards them as of no validity against those whose property is the subject of the trespass, save when by acquiescence or neglect the right to object to it is waived or lost."

See, also,

Larimer County Canal etc. Co. v. Larimer etc.

Reservoir Co. (Col.), 143 Pac. 270;

Titcomb v. Kirk, 51 Cal. 288, 294;

Correa v. Freitas, 42 Cal. 339;

Boglino v. Giorgetta (Col.), 78 Pac. 612, 614;

Rasmussen v. Blust et al. (Neb.), 120 N. W. 184;

Mud Creek etc. Co. v. Vivian (Tex.), 11 S. W. 1078;

Vestal v. Young, 147 Cal. 715;

Last Chance W. D. Co. v. Heilbron, 86 Cal. 17, 18.

In the case at bar, it is plainly shown that the appellee did not acquiesce in, or neglect to object to, or waive anything in the premises. On the contrary, it resisted each and every effort of the appellant to invade appellee's rights, and in order to protect its rights was even obliged to tear out some of the flume and logs which had been put in the creek on the Lotta claim on October 3, 1910. As the Court of Appeals of Colorado said, in the case of *Larimer & Weld Irr. Co. v. Landers*, 141 Pac. 517, at page 519:

"The evidence shows that the flume was torn out several times by defendant, which indicates that it was placed there without license and against the latter's wish and consent."

The water was taken from the Lotta claim by trespass, then by trespass taken over the Parish No. 2 claim,

which at that time was a valid outstanding location; and, under well settled doctrine, under these circumstances, the appellant could not assert or claim any right to the waters of Gold Creek, as against the rights of the appellee.

EIGHTH.

APPELLEE WAS THE FIRST TO COMMENCE WORK LOOKING TOWARD THE APPROPRIATION OF THE WATERS OF GOLD CREEK. EVEN IF APPELLANT COMMENCED WORK FIRST, THE WORK WAS EITHER A TRESPASS AND OF NO AVAIL TO APPELLANT, OR WAS SO REMOTE AND DISTANT FROM THE PLACE OF THE DIVERSION OF THE WATER FROM GOLD CREEK BY APPELLANT, THAT IT CONVEYED NO NOTICE TO APPELLEE.

We have heretofore shown that the Mulligan notice had no legal value; that the posting of it on the Lotta claim, the property of the appellee, was a wilful trespass; and that, therefore, no rights could have been initiated or acquired thereunder. If we have established this fact, appellant cannot apply the doctrine of relation of appropriation of the waters of Gold Creek back to the first of August, 1910. Appellant claims (Brief, page 8):

“On the same day this notice (the Mulligan notice) was posted (August 1st), Kinzie sent O. M. Harri to Gold Creek to make preliminary arrangements to accommodate a crew of men who were to work on the construction of flumes, tunnel, etc., brush out trails, etc. Lumber was provided for the building of a bunk house for the men. By August 3rd five men were at work, including two Indians, brushing out trails.”

It is contended by appellant that the posting of the Mulligan notice *and the asserted commencement of the work thereunder*, were prior in time and prior in right to the appellee.

We will show, first, that appellant did not, before the appellee, commence work looking toward any appropriation of the water of Gold Creek, and second, that, if appellant did commence work before appellee, such work was of no avail, and appellant can claim no right thereunder, and that it does not aid it in the application of the doctrine of relation.

1. Appellant did not commence any work connected with the appropriation of the water of Gold Creek before appellee.

In the consideration of this subject, we respectfully ask the court to have before it defendant's exhibit "S" (Tr. Vol. VI, p. 2167). Appellant claims that it commenced work on August 1, 1910, near the Jualpa dam. This dam is shown on exhibit "S", and is situated on Gold Creek near Cape Horn No. 2. It is claimed that a man by the name of O. M. Harri was sent by Kinzie, the superintendent of appellant, to commence this work on the morning of August 1st. One of the strange things, concerning the commencement of this work by Harri, is that Kinzie states that Harri was never on the ground before he sent him up there on August 1st, and still no one accompanied Harri to give him any information, as to where he should commence work or what he should do (Tr. Vol. I, p. 258).

Kinzie also stated that he sent Harri up there, in the first place, to see if assessment work had been done on the Parish No. 2 claim, which was in the possession, as we have shown, of appellee at that time, but claimed by appellant by virtue of its two Oregon locations, the one made by Corbus in 1899 and the other made by Datson in July, 1910 (Tr. Vol. I, p. 261). This same man Harri testified that he went on what is known as the Oregon claim on August 1, 1910, and was looking around to see if there had been any assessment work done (Tr. Vol. II, p. 391); that he came down from the property on the night of the 1st of August and went to Treadwell (Tr. Vol. II, p. 393).

Kinzie, who had given Harri orders to go on the property above described, to see if the assessment work had been kept up, was then superintendent of appellant and also superintendent of the Treadwell Company, and resided at Treadwell. The only reason for Harri's going to see Kinzie was to report on what he had found out about this assessment work. Harri has an artificial leg (Tr. Vol. I, p. 326); and it would, therefore, seem that he could hardly have succeeded in getting around these mountainous claims and in examining them for assessment work.

Fred Radel testified that he had a conversation with Harri sometime in September or October, 1910, and that Harri stated at that time that Kinzie had sent him up on the appellee's property to look over it to see whether or not the required assessment work had been kept up (Tr. Vol. II, p. 587).

This evidence, we submit, is absolutely inconsistent with the contention of appellant, that it commenced work looking toward the appropriation of the water of Gold Creek on August 1, 1910 (Brief, p. 51).

The question naturally arises how long it took Harri, with his artificial limb, to go over the property and ascertain what assessment work had been done on all of the unpatented claims. The record is silent upon this point.

Wettrick testified that his partner Hill was with him on October 3, 1910, when they went up there to survey and establish the grade for the flume line of appellee, and that they did not see anyone on the old road or trail upon which, appellant claims, it first commenced its work (Tr. Vol. II, p. 644). Mackay also states that he did not see anyone at this place on October 3rd. Of course, this is in the way of negative proof, but we submit, it should have weight, in view of the other testimony which we have cited, given by appellant; besides, it shows that the appellee, on August 3rd, when it went up there to commence work, had no notice of what appellant was doing.

There seems to be but one possible conclusion from the foregoing testimony, and that is, that the appellant did not commence any work looking toward the appropriation of the water of Gold Creek prior to the 3rd day of August, 1910, at which date appellee commenced its work under the Tripp notice; and that, therefore, appellee is prior in time, so far as the commencement of the work relating to the appropriation of the water, is concerned.

2. No work was done by appellant prior to the latter part of September, 1910, looking toward the diverting of the water from Gold Creek, at the place where it afterwards built its dam.

Harri testifies that the first thing which he did, when he went on the property, was to ascertain if any assessment work had been done on the Oregon claim, and when he went up on the property on August 3rd, he put some boards in the creek at the place where the Mulligan notice was posted, and did a little sluicing (Tr. Vol. II, pp. 402 and 407).

It is conceded by appellant that its clearing out of brush from the Jualpa dam to where Harri built his cabin was practically over an old trail (Tr. Vol. II, p. 420; see also, Kinzie's testimony, Tr. Vol. I, p. 267).

One of the witnesses testified that where Harri cut brush from the Jualpa dam up to his cabin was along an old and well-beaten wagonroad and path that had been used before (Tr. Vol. II, pp. 461, 462). Harri testified that the distance between his cabin and the Jualpa dam is about 1,000 feet; other witnesses testify that it is more; and the trail that he cleared out between the Jualpa dam and his cabin cannot be seen from where appellant afterwards built its dam (Tr. Vol. II, p. 413).

The witness Wettrick testified that this trail runs from the Jualpa Company's dam to the cabin of Harri as follows: The road, which leads from the Jualpa dam is over the Colorado claim and across appellee's property; anyone could reach Harri's cabin by going on this old road for about one-third of the way from the Jualpa dam; this old road, prior to August 1, 1910, could be

seen upon the ground where it was laid out. The witness said that he had travelled over the road as early as 1908 and in 1910 there was some small brush along the side (Tr. Vol. II, p. 644).

The same witness, Wettrick, testified:

“Q. Now, I will ask you to apply your rule to this exhibit (Appellee’s Exhibit ‘S’) and just tell what amount of that trail would be on what is marked on this map and plat as the ‘Cape Horn’ and ‘Auk Chief’ lode?

A. I should say that there was about 200 feet, I think, of that on the ‘Taku Queen’ lode and a portion of it on the ‘Cape Horn’ ” (Tr. Vol. II, p. 690).

These two claims, the Taku Queen and the Cape Horn, were the property of appellee. They were never owned by appellant.

This witness further stated that he knew the location of what has been referred to as the “Harri Cabin” or bunkhouse, claimed to be the property of appellant, and he pointed out on appellee’s exhibit “S” and located the cabin on the Cape Horn lode at the nearest corner, and it is marked on this exhibit “S” “*Alaska-Juneau Cabin*” (Tr. Vol. II, p. 642).

The witness further testified that he had made a survey in 1910 to ascertain the exact location of Harri’s cabin. The witness was handed an exhibit marked defendant’s exhibit “C” for identification, and was asked if he knew whose map and plat it was; he stated that it was a copy of a map introduced by the Alaska-Juneau (appellant) at a former trial (meaning Cause 835a, above referred to in this brief). This plat was

offered in evidence and marked defendant's exhibit "B", and was a copy of a map made by appellant for its own use. Witness pointed out on this exhibit Harri's cabin and showed that appellant had located the cabin on the Cape Horn lode claim, the property of the appellee (Tr. Vol. II, p. 643). The building of this cabin was, therefore, also a trespass.

This cabin is frequently referred to by appellant in its brief as a bunkhouse for its employees, to be occupied by them during the grading of the flume line, construction of its flume, and the building of its dam. As a matter of fact, the little cabin was nothing more than a cabin for Harri to occupy, and never was built or intended as a bunkhouse. One James Dempsey (Tr. Vol. II, pp. 464, 466, 467), shows that this little cabin was built by Harri himself and by one Burg in five or six days, and was completed about the 11th or 12th of August. This same witness frequently referred to the building as the "Little Cabin"; he stated that it was about 14x18 feet, was built single-boarded, and that no bunks were placed in it, and that Harri slept on the floor.

This, then, is the bunkhouse, upon which the appellant claims it expended so much money to shelter its employees. The evidence shows that no one, other than Harri, was ever in this cabin or occupied it.

According to Harri, himself (Tr. Vol. II, p. 413), this cabin could not be seen from the place where appellant afterwards built its dam. Kinzie stated in his testimony, that Harri's cabin on a straight line down the creek is about 800 feet from where the dam was con-

structed (Tr. Vol. I, p. 295). It has been shown, by Harri's testimony, that the distance between his cabin, down the creek, and the Jualpa dam is about 1000 feet on a straight line. Following the meanders of the creek, then, *it would be something near a mile from where appellant constructed its dam to the Jualpa dam where appellant says it first commenced work.*

It appears in the evidence, and is conceded by both appellant and appellee, that at about the place where Harri's cabin was built, or a little above it to the right or left, were two pieces of tunnelling work commenced by appellant, one, for the flume of appellant, if the water were taken off the Lotta claim where the Mulligan notice was posted, and the other about 16 feet directly below and under the first tunnel. The appellant later put its flume line through the lower tunnel, tapping the creek by this flume line at the point where appellant afterwards built its dam; that is, the dam which was constructed before the appellant was ejected from the Lotta claim by reason of Judge Cushman's decision.

Wayland, a civil and mining engineer, and a witness on behalf of the appellant, testified that he went up near Snowslide Gulch on the 29th or 30th of August, 1910 (Snowslide Gulch is shown on appellee's exhibit "S"); that nobody was working there except Harri; that he, Wayland, went up the creek as far as the Mulligan notice (Tr. Vol. II, p. 448), and at that time he pointed out to Harri from the Jualpa flume, which is on the opposite side of the creek, where the grade of appellant's flume line should run to divert the water from Gold Creek at the point where the Mulligan notice was posted (Tr.

Vol. II, p. 449). The same witness further stated that he was on the premises at one other time in August of the same year, and that there was no one working on the premises, except Harri. (There was a witness, by the name of Harri, called by appellee, who is to be distinguished from the Harri to whom we have just referred.)

A witness named Lindsey testified that he was in the employ of the appellant, during the summer of 1910, and that he was employed to go upon this property and survey a flume grade, and the first survey was made by him on September 12, 1910. That the grade which he established was about 16 feet above the grade upon which appellant's flume was built; that he did not, on September 12, survey out and establish the grade line of the flume which was afterwards built by appellant between Snowslide Gulch and appellant's dam; that several days, or a week after this, he did survey out the line upon which the flume was afterwards built; that the first survey he made was after the upper tunnel was started, and that any work, which had been done before he made the survey, was done without any survey whatever being made; that, if the flume had been built on the grade of the upper tunnel, it would have tapped Gold Creek just about where the Mulligan notice was posted (Tr. Vol. II, pp. 475, 477, 478).

It thus appears from the foregoing testimony of the witnesses Wayland and Lindsey, two mining engineers and surveyors in the employ of the appellant, that until the 19th or 20th of September, 1910, there never was any survey made of the flume line, upon

which the flume was afterwards built, between appellant's air compressor at Snowslide Gulch and where it built its dam; that, if appellant did any work looking toward the appropriation and the taking of the water from Gold Creek prior to that time, it was done upon a grade to take the water from Gold Creek where the Mulligan notice was posted on the Lotta patented claim. *But this was work in furtherance of the wilful trespass, initiated by the posting of the Mulligan notice on the patented property of appellee; and, we submit, appellant can claim no rights thereunder.*

As a matter of fact, the evidence shows that all of the work done by appellant was a continuing trespass, whether it was done upon the first contemplated flume line or upon the second one, for the reason that a flume, built over the grade of either line, would have taken the water from Gold Creek on the Lotta patented claim of appellee.

It was determined by Judge Cushman, in his decision, that the water was taken from Gold Creek from the Lotta claim, by means of a dam built thereon by appellant and sheered into the flume, which appellant built upon the lower grade, or along the line surveyed out the 19th or 20th of September, 1910.

3. **No open or physical demonstration of an intent to appropriate the water was made by appellant prior to October 3, 1910.**

Leaving out the question of rules, regulations, customs and statutes prescribing how water may be appropriated, in determining the time when the right to water

by appropriation commences, we find numerous authorities which hold, that:

“In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but by applying the doctrine of relation fixes it as of the time when he *begins his dam or ditch or flume or other appliance*, by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence.”

Union Mill & Mining Company v. Dangberg, 81 Fed. 73.

See, also:

Black, Water Rights, Section 55;

Mining Company v. Carpenter, 4 Nev. 534, 544;

Kimball v. Gearhart, 12 Cal. 28;

Osgood v. Mining Company, 56 Cal. 571.

In the case of *Hough v. Porter*, (Ore.) 95 Pac. 732; 98 Pac. 1083, the court uses the following language:

“To constitute an appropriation for mining, irrigation or other power purpose, *a diversion thereof, or other good notice is necessary.*”

In *Farnham on Waters*, Vol. II, p. 2055, Section 662, it is stated:

“To constitute an appropriation of water sufficient to vest a right therein under the Wyoming Irrigation Laws there must exist not only an intent to take the water, but that intent must be accompanied or followed by some *open, physical demonstration.*”

The commencement of active operations, unless such operations are such as *to impart notice to the other*

claimant, is of no value. The decisions dealing with this phase of the case always refer to the building of a *dam, flume, or laying of a pipe line, or digging of ditch, etc.*, which, of course, is a physical demonstration, which would impart notice to the rival claimant to the water. The same doctrine applies when there are rules, regulations or statutes governing the appropriation of water, and neither of the rival claimants follow the statutes, rules and regulations. In such a case, the better right would, by relation, be in him, who began first *in a way that gave notice from his acts*; provided he prosecuted the work with diligence.

Wiel on Waters, 3rd Ed., p. 405;

60 Am. St. Rep. 801;

Naeris v. Briknell, 68 Am. Dec. 257;

Kimball v. Gearhart, 12 Cal. 27.

The trial court in Finding V (Tr. Vol. VII, p. 2654), declares:

“That not until after the defendant (appellee) had followed up its first step, namely, posting of notice, by actual physical work at the point where its notice was posted, and after actual diversion of water at such point, did the plaintiff (appellant) do anything that would give notice to the defendant (appellee) of any claim that the plaintiff (appellant) intended to make to the water of Gold Creek, or to do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek.”

The court undoubtedly had in mind, in making this finding, that the first open, physical demonstration of any character, made by appellant looking towards the appropriation and use of the water of Gold Creek and

which was calculated to give notice to appellee, was on October 3, 1910, when the appellant undertook to commit a trespass and to put in a dam on the Lotta claim and had employees of the appellee arrested.

4. The work of appellee gave prior notice.

The first *open, physical demonstration* made by appellee was about the middle of September, 1910, at which time the appellee had cut away an opening in its dam and excavated a ditch just below the opening, put in a headgate in the opening of the dam and allowed the water to flow through the same into the ditch (see testimony of John Carlson, Tr. Vol. II, pp. 742, 743; testimony of Al. Black, Tr. Vol. III, pp. 803, 804).

5. Appellant's asserted rights are predicated entirely upon its attempt to appropriate water on private land.

Appellant states (Brief, p. 46):

“If we are to assume that there was no local rule or custom on the subject, then the one who first commences the work secures the prior right, and in this case it was the Alaska-Juneau”;

and then it cites the case of *Van Dyke v. Midnight Sun M. & D. Co.*, 177 Fed. 85, 92, from which the following is quoted:

“Inasmuch as the Statutes of Alaska make no provisions respecting the necessity of either the posting or recording of notices of appropriation of water *upon the public land*, we think no such notice essential to the validity of a *bona fide* diversion of such waters for a beneficial use in Alaska.”

The above doctrine is not applicable here, because, in that case, no custom was shown. Moreover, the citation

of this case, which deals solely with appropriation on *public lands*, indicates a failure to recognize the distinction between the appropriation of water on public lands and the right to appropriate water on lands held in private ownership. We have shown, we think, that the taking or appropriating of water on public lands has nothing to do with the position of appellant, which is entirely founded upon its attempt to appropriate water on appellee's property.

NINTH.

THE RIGHTS OF APPELLEE MAY BE SUSTAINED UNDER THE NOTICE POSTED BY JOHN R. WINN ON BEHALF OF AND FOR APPELLEE ON AUGUST 17, 1910.

Appellant, in its brief, simply mentions the notice posted for appellee by John R. Winn on August 17, 1910, and says that it will discuss it somewhere later on (Brief, p. 13), but this it failed to do. We are, therefore, not apprised of the position which appellant takes with reference thereto.

It cannot be claimed that this notice was not posted for appellee, because it appears on the face of the notice itself that it was so posted. It is our contention that, even if the Tripp notice were ineffectual and even if appellee acquired no rights thereunder, nevertheless, the work done and performed on appellee's property, looking toward the appropriation and use of the water of Gold Creek, would date back, by the doctrine of relation at least to the posting of the notice by Winn.

The Winn notice was posted by John R. Winn, as agent and attorney for appellee, on the 17th day of August, 1910. It was posted on the old Ebner dam at the intake of the new flume, on the opposite side from the Tripp notice. The notice was as follows (Tr. Vol. VI, p. 2218):

“NOTICE OF WATER LOCATION.

“Notice is hereby given that the Ebner Gold Mining Company, a corporation, are the owners and claim under this Notice all the waters of this creek, Gold Creek, to its entire flow during all seasons and at all time or times, that said corporation is not already entitled to by reason of prior right or prior location or appropriation, or prior right to use or appropriate; that is all the water of said creek, if any, in excess of what said corporation is not now entitled to by reason of prior location, use or appropriation or riparian ownership, to be conveyed by ditch, flume, or pipe or in any other practical or convenient way from said creek and creek bed and to be used in the working, mining, and developing of the mines owned by said Ebner Gold Mining Company, and in milling, treating and reducing the ores taken from said mines of said corporation and for other beneficial and useful purposes.

“Said Ebner Gold Mining Company does not intend by this notice to waive any right that it may have to the use of the waters of said creek by reason of its flowing over the mines and mining claims now owned or possessed by it, and does not waive any right of riparian ownership of said water or riparian use of said water flowing over the mines and property owned or possessed by it; nor does not waive any right to the use or any or all of said waters by reason of its or its predecessors in interest prior location, appropriation or use of said water.

"This notice is posted on the Ebner Dam on the Crown Point Lode Claim (patented) U. S. Survey No. 90, and owned by the Ebner Gold Mining Company, the locator herein.

"Date of this Notice of Location August 17, 1910.

"Posted on the 17th day of August, 1910.

EBNER GOLD MINING Co.,

By Jno. R. Winn,

Its Agent and Attorney.

Witnesses:

Newark L. Burton.

William Walker."

The notice was, on the 17th day of August, 1910, recorded in the office of the recorder for the Juneau Recording District, at Juneau. In reference to the posting of this notice, Mr. Winn testified as follows:

"Q. I hand you a picture and ask you if there is anything on there that you particularly recognize?

"A. This is Defendant's Exhibit 'F-1' (which is found in Vol. VI, at p. 2229); it is the photograph that was identified by Mr. Wettrick this morning, and I identify the post or board near the intake of the new Ebner flume, and also the cross board that is on it, as being the place at which I posted up a certain location notice that I made for the Ebner Gold Mining Company, which has been offered in evidence in this case; I also may state in that connection that Al. Black came over at the time I put up this notice, and Mr. Black had been at work up there for some days and had the approach for the right of way of the flume cleared away for quite a little distance from the intake of the flume at the Ebner dam (meaning the intake of the new flume). Black came over and he was there at the time the notice was posted, and I walked over and saw what work he had been doing. Mr. Hill and Mr. Wettrick went up there

with me to post the notice" (Tr. Vol. IV, pp. 1218-19).

The copy of the photograph, referred to as being on page 2229 of Volume VI of the record, is very dim and the objects thereon cannot be very well seen without a magnifying glass, and we, therefore, respectfully ask the court to examine the original photograph on file, as it is much plainer and all of the objects on it can be easily seen and distinguished.

We have heretofore shown the work done by appellee, looking toward the appropriation of the water of Gold Creek, the time of the commencement of it, and the progress of the same.

We have likewise shown that not until September 19 and 20, 1910, did appellant survey out the flume line upon which it constructed its flume; that the first survey which was made by appellant of any flume line was on the 12th day of September, 1910, and that any work which was done by appellant, prior to that time, leaving out that accomplished by the trespass, was in such a desultory manner and so far distant from where appellant afterwards took the water from Gold Creek, that it could not have imparted notice to appellee of appellant's intention.

TENTH.

THE JUDGMENT WILL NOT BE REVERSED UPON THE GROUND THAT THE DECREE AWARDS TOO MUCH WATER TO APPELLEE.

Appellant states (Brief, p. 70), that

"the court finds that the capacity of the new Ebner flume is 3200 inches, and yet the decree awards

10,000 inches, the amount named in the Tripp notice”.

Even if the finding by the lower court did not justify its award, the appellate court would, we submit, not reverse but would simply modify the decree, giving the appellee 3200 inches. For, as said by the author in 3 Cyc., page 427:

“On appeals in equity cases, where the court can see from the record what the rights of the parties are, it will not remand the case, but will render such decree as ought to have been rendered below.”

As said by the court in *Harrison v. Clarke*, 182 Fed. at page 767:

“It is well settled practice in the Federal Court of Appeals, in reviewing equity causes, to dispose of them finally on the record before the Appellate Court and not remand them for further trial in the Circuit Court.”

See, also:

Mason City & Ft. Dodge R. Co. v. Boynton,
(C. C. A. 8th Cir.) 158 Fed. 599.

For a case very similar as to its facts, and holding that the upper court will merely modify the decree of the lower court to make it conform to its findings, when the findings and the decree conflict, see:

Animas Consolidated Ditch Co. v. Smallwood,
(Colo.) 125 Pac. 594.

CONCLUSION.

We earnestly and respectfully submit that it is manifest from the record in this case that the court below

was entirely right in its conclusion that the appellant has established no rights whatever to the waters of Gold Creek; and that, if this court should determine that appellant has any such rights, then, that they are subject to the prior rights of appellee; and that, in either event, the decree should, therefore, be affirmed.

Dated, San Francisco,

December 16, 1916.

Respectfully submitted,

JOHN R. WINN,

ALFRED SUTRO,

Attorneys for Appellee,

Ebner Gold Mining Company.

WINN & BURTON,

PILLSBURY, MADISON & SUTRO,

A. D. PLAW,

Of Counsel.

APPENDIX.

THE FINDINGS.

I.

That the defendant, the Ebner Gold Mining Company, was, prior to the filing of the complaint of plaintiff herein, and at the time of the trial of said cause, and now is, a corporation, duly organized and existing under the laws of the Territory of Alaska, and as such has complied with all of the rules respecting corporations doing business in the Territory of Alaska, and has paid its license fees as provided for by Chapter II of the Session Laws of 1913 of the Territory of Alaska, and is authorized to sue and maintain suits, actions and proceedings in said Territory of Alaska, and that the remaining defendants are merely nominal and not necessary defendants.

II.

That the said Ebner Gold Mining Company is the principal defendant in this case, the other defendants are not necessary parties to the action, but are made defendants by reason of the facts alleged in the complaint, and they are in no wise connected with the ownership of the property hereinafter referred to, or in any wise connected with the water right in question so as to affect the determination of this case. The Ebner Gold Mining Company was for a long time prior to the commencement of this action, and was at the trial of the same, the owner of a large number

of contiguous quartz mining claims and mill sites in Silver Bow Basin near Juneau, Alaska. That these mining claims carry and contain gold in great value in the form of a low grade milling ore. That the upper end lode claims lie high up in the mountains and the mill sites in the valley below; that Gold Creek flows over and across the said group of lode claims commencing at the upper end thereof, then, in its course, winds its way down to the mill sites of said company; the said creek is a mountain stream with considerable fall and rapids. and at certain seasons of the year carries quite a large volume of water. and. at other seasons the flow of water is somewhat small by reason of cold weather. That for 15 or 20 years prior to the commencement of this action by the plaintiff, the Ebner Gold Mining Company had been mining and milling the ores taken from some of their claims at the upper end of the group and for said purpose constructed, operated and maintained part of the time a 10-stamp quartz mill and part of the time a 15-stamp quartz mill located at the upper end of the group of claims, and in connection with the quartz mill constructed and maintained ore bunkers, air-compressor and all buildings, equipment and machinery necessary for successfully operating said mill, mining and milling and treating the ores taken from said upper end lode claims. That for the purpose of power in the mining and milling of said ore, the said company diverted and appropriated and used from Gold Creek water, all the water that was necessary for the purposes above referred to. This

diversion of water from Gold Creek was also made at the upper end of the group of claims and taken off of the property of the defendant company, used for the purpose above mentioned, and returned to Gold Creek.

III.

That some time about 1908, and a long time prior to the commencement of this action, the Ebner Gold Mining Company and its general manager and president, William M. Ebner, concluded to open up the said mining property and mine, mill and treat the ores taken therefrom upon a larger scale than it had theretofore been operating said mines, and to that end and purpose it was concluded to drive a large working tunnel, commencing said tunnel at the lower end of the property upon what is known as Cape Horn No. 2 lode claim belonging to said company, thence driving said tunnel through said group of claims to the upper end of the same to the old workings, which said tunnel would crosscut the formation and show up the values of the property, as well as to serve as a working tunnel. They also concluded upon building and constructing and equipping a large stamp mill of about 150 or 200 stamps at or near the portal of said crosscut and working tunnel and to build and construct a flume and pipeline to take from Gold Creek a large quantity of water and convey it from a point at or near where the water had been diverted from the creek in connection with the said 15-stamp mill, which is at the upper end of the group of claims, to a point near the portal of the tunnel and at the

place where it was decided to erect the 150 or 200 stamp mill, and to erect such other buildings and install such other machinery so as to carry out the plans decided upon.

That during the year of 1909 one H. T. Tripp, an experienced mining engineer, was employed by persons interested in said group of mining claims of the Ebner Gold Mining Company to look over, examine and explore said mining property and to report on the advisability of opening up and mining said property on a larger scale, as had been decided on by the said William M. Ebner, and the said Ebner Gold Mining Company. That said Tripp made a thorough examination of the property, its formation, the ore body or bodies, and the water of Gold Creek flowing therethrough, and reported favorably on what the said Ebner and Ebner Gold Mining Company had concluded to do. That Tripp completed his work and made his report about the last of June or the first of July, 1910.

IV.

The court further finds that as early as October, 1880, the miners in and near the vicinity of Juneau and Silver Bow Basin, including the territory covered by the Ebner Company's group of mining claims, diverted and appropriated water from streams to be used for mining and other beneficial purposes and ever since about that date it has been the universal practice and general custom for any person or corporation desiring to appropriate water for the purposes last above mentioned to post a notice in writing in a

conspicuous place at the intended point of diversion on the creek or stream from which the water is expected to be diverted or taken; that the posting of such notice has always been considered under such general custom of miners as the first step taken looking towards the appropriation and applying the water to mining or some other beneficial use as well as showing the intention of the person or corporation posting the notice and giving warning and notice to others of the poster's intention of utilizing such water.

And the court further finds that the posting of the notice in the manner above mentioned does serve the purpose above stated. That the said H. T. Tripp knew of the above mentioned custom, and while examining and exploring the group of mining claims of the said Ebner Gold Mining Company as stated in these findings, on the 29th day of June, 1910, attached to a board and posted in a conspicuous place on the Ebner Gold Mining Company's dam, which had been constructed for the purpose of diverting the water and conducting it to the 15-stamp mill, a written notice claiming 10,000 miners' inches of water of the said Gold Creek, which said notice is as follows:

“NOTICE OF WATER.

Notice is hereby given to all whom it may concern that I the undersigned claim 10 thousand miners' inches of water flowing in this creek or any part of 10 thousand miners' inches that may be flowing at any season of the year to be conveyed by ditch, flume or pipe along the bank of Gold Creek with pipe or flume or both to any place on the property known

as the Ebner Mine or to carry across or farther than the limits of the said mine property. This location is made on the ground this day and date and is posted at the place known as the Ebner dam about $1\frac{3}{4}$ miles up from Juneau, Alaska, on Gold Creek.

Dated this 20th day of June, 1910.

Time—7:30 A. M.

Locator—H. T. TRIPP.

Witness: JOHN SOINI."

That said notice could be plainly seen from a public highway which runs up Gold Creek and in close proximity to said dam on which said notice was posted. That while said H. T. Tripp signed or affixed his own name to the notice, the said making out of said notice and posting of the same, and said step so taken looking towards the applying of said amount of water to use for mining or other beneficial purposes, was done by the said Tripp on behalf of and for the said group of mining claims of the Ebner Gold Mining Company and parties interested therein, and said water was intended to be conducted down over and across the said group of mining claims from the point of intake of the said defendant company to the mill site and tunnel portal on the Cape Horn No. 2 claim at the lower end of the Ebner property and there to be used and applied to the air-compressor and the new mill to be built, and for mining purposes generally, as had been contemplated under the Ebner and Tripp scheme of opening up, mining and operating said property on a larger scale as has been referred to in these findings.

V.

The court further finds that the action of said Tripp in posting of said notice mentioned in the finding above set forth was the first step taken by anyone looking towards the future diversion and appropriation of the water of Gold Creek, and said action of said Tripp was prior to any step taken by plaintiff, or any intention made manifest by plaintiff, of taking any water from Gold Creek and applying it to mining or other beneficial use, and was prior to the posting of any water location notice by said plaintiff.

That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was posted and after actual diversion of the water at such point, did the plaintiff do anything that would give notice to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek.

(There is no Finding VI.)

VII.

That by certain mesne conveyances said H. T. Tripp a long time before the commencement of this action assigned or conveyed whatever right or title he acquired by reason of posting the notice signed by him, to the defendant, Ebner Gold Mining Company.

That work was commenced under said Tripp notice and those for whom said water was located and their

successors in interest have proceeded with due diligence with their work in the opening up and developing of said mining property and the application of the water of Gold Creek under said notice to actual use. The tunnel mentioned in these findings which had been decided upon to be driven by said Tripp and Ebner was soon after the filing of said notice surveyed out, commencing at the lower end of the said group of claims on Cape Horn No. 2 lode claim, and extending to the upper end of said group of claims to what is known as the old Ebner workings, about the point of the 15-stamp mill, and had been driven at the time of the commencement of this action 2600 feet and taps the ore bodies of said group of claims at various depths, being from the bottom of said tunnel to the surface about.....feet. That a right of way was surveyed out for a high line flume which had been decided upon by said Ebner and Tripp, said survey commencing at the point where the Tripp location notice was posted and extending around the hillside across the Ebner property to a point near the portal of the tunnel and the mill site, which said flume is $3\frac{3}{4}$ feet by 4 feet and about 4000 feet long, and has a carrying capacity of approximately 3200 miner's inches of water, and had been completed at the time of the commencement of this action. Lumber and material were purchased for a 200-stamp mill, and most of the machinery bought to equip said mill, the mill site graded at or near the portal of said tunnel, and at or near the point where the water was to be conveyed. That on the 14th day of September, 1910, water was diverted from Gold Creek at a point where the Tripp notice

was posted, said water run through a large open cut made for the purpose of laying the new flume, and this diversion of the water from Gold Creek was prior to any diversion therefrom made by the plaintiff herein. The new flume line above referred to was completed from a point on Gold Creek where the Tripp notice was posted to the penstock of said company on the 15th day of December, 1910. Work was commenced on the tunnel above referred to on or about the..... day of....., 1910, and was diligently and actively kept up, said tunnel being 8 feet by 8 feet, and as above stated had been driven 2600 feet at the time of the commencement of this action, and at the time of filing the answer in this cause there had been over 4000 feet of tunnelling, cross cuts and drifts completed. That before the commencement of this action a large new air-compressor plant had been erected near the mouth of the tunnel and a pipe-line leading from the penstock above mentioned to the air-compressor, and in August, 1913, said pipe-line was connected up with said air-compressor and the water used for power in running the same, and said air-compressor was used in continuing the driving of the new tunnel referred to in these findings and has been applied to that use ever since said last mentioned date. Prior to the commencement of this action the lumber and material referred to herein for the building of the 200-stamp mill as well as the machinery for the equipment of the said mill had been purchased and forwarded to Juneau, Alaska, and most of the same on the mill site near the place of the erection of the new mill. That since the commencement of this action and at

the time of the trial of the same, work has progressed on said property with due diligence and from time to time larger quantities of water taken from Gold Creek through the said new flume and applied to use by the defendant company as necessity demanded.

VIII.

The court further finds that at the time the plaintiff in this case claims that the defendants were wrongfully depriving said plaintiff of the use of the water of Gold Creek, the defendants were using the same, and it was necessary for the defendants to have the same to progress with their said work. That it has been necessary at all times for defendant to have the use of said water.

IX.

That the tunnel being driven by the defendant, the Ebner Gold Mining Company, referred to in these findings, is being driven through the group of Ebner lode mining claims, known as the Ebner mine, being the group of lode mining claims for the benefit of which said water was located by said Tripp, as afore-said, and all of the work in connection with the development and opening up of the ore bodies in said group of claims since the location of said water by said Tripp has been done with diligence, and \$351,000.00, more or less, expended in opening up such ore bodies in said Ebner group of lode mining claims, and the work was at the time of the trial still progressing with diligence. That all of said work was being done for the purpose of opening up the Ebner group of lode

mining claims as a mine so that the bodies of ore within the exterior boundary lines of said group of claims could be opened up and mined, and the ores milled and treated, and the precious metals extracted therefrom.

X.

With reference to the rules and regulations which plaintiff sets out in its reply and claims were adopted by the miners of Harris Mining District in 1882, covering and governing the appropriation and diversion of water from streams for mining and other beneficial uses, the court finds, after careful consideration of the evidence and the law relating to such rules and regulations, that they never were followed by the miners and were never put in force, or, if they ever were followed or put in force, they fell into disuse and became obsolete before the rights of either of the parties to this action were claimed to be initiated, and that they are inconsistent with the general laws of the United States and could not be in force since the extension of organized government to Alaska in the year 1884, and are therefore of no effect in the determination of the issues in this case.

XI.

The court further finds that the work of diversion, appropriation and application of the water from Gold Creek by the defendants herein was prosecuted to completion with reasonable diligence from the time of the inception of said right.

And from the foregoing findings, the court drew the following

CONCLUSIONS OF LAW.

I.

That as against the plaintiff, the defendant is the owner of and entitled to the first use of 10,000 miners' inches of water, to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted.

II.

That whatever rights plaintiff has in the water of Gold Creek by reason of anything set forth in its complaint, is subsequent, inferior and subordinate to the rights of the defendant, as set forth in these findings.

III.

That the plaintiff is not entitled to the relief asked for or to any relief.

NO. 2795

In the
United States Circuit Court of Appeals
For the Ninth Circuit

ALASKA JUNEAU GOLD MINING
COMPANY

Appellant,

vs.

EBNER GOLD MINING COMPANY, et al,
Appellees.

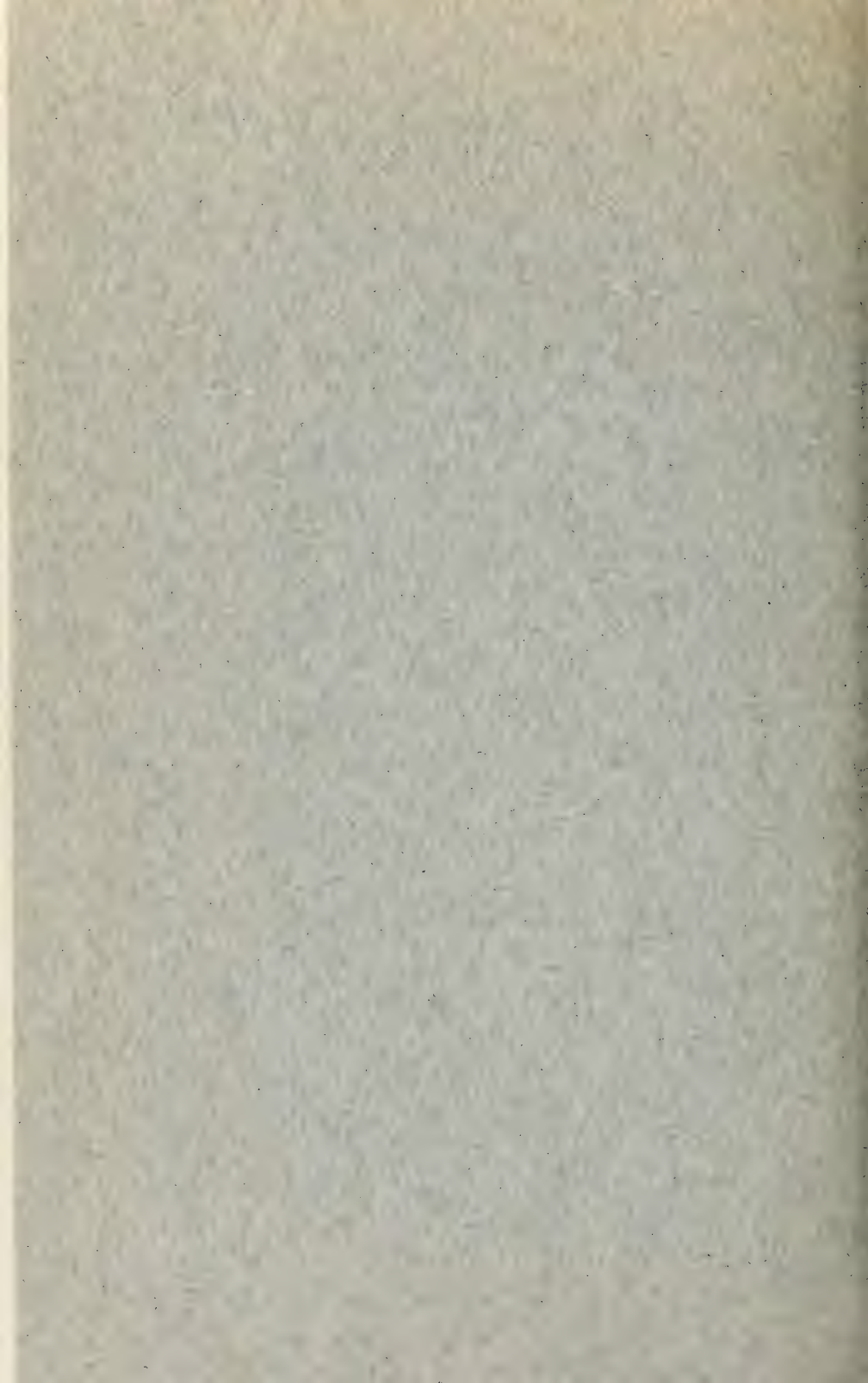
PETITION FOR REHEARING

J. A. HELLENTHAL.
CURTIS H. LINDLEY.
HELLENTHAL & HELLENTHAL.
Attorneys For Appellants.

ALASKA DAILY EMPIRE PRESS
Filed

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F. D. Monckton,



In the
United States Circuit Court of Appeals
For the Ninth Circuit

ALASKA JUNEAU GOLD MINING
COMPANY

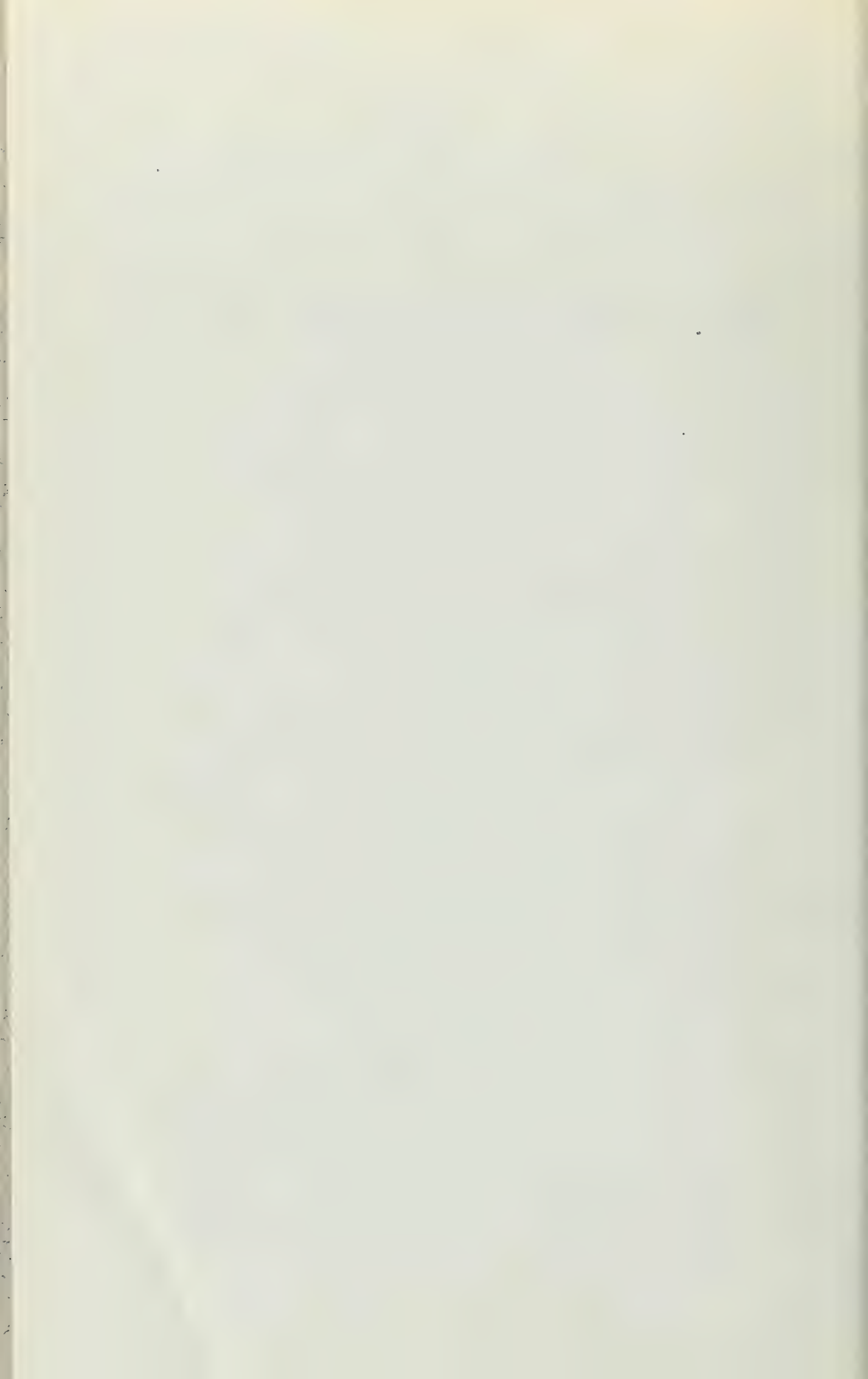
Appellant,

vs.

EBNER GOLD MINING COMPANY, et al,
Appellees.

PETITION FOR REHEARING

J. A. HELLENTHAL,
CURTIS H. LINDLEY,
HELLENTHAL & HELLENTHAL,
Attorneys For Appellants.



UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE NINTH CIRCUIT

Alaska Juneau
~~EBNER~~ GOLD MINING COM-
PANY, a Corporation,
Appellant,

vs.

EBNER GOLD MINING COM-
PANY, a Corporation, the AL-
ASKA-EBNER GOLD MINES
COMPANY, a Corporation, AN-
GUS MACKAY, as receiver for
the ALASKA-EBNER GOLD
MINES COMPANY, a Corpora-
tion, and DOWIE, D. MUIR,
Appellees.

PETITION FOR REHEARING

Comes now the Alaska Juneau Gold Mining
Company, a corporation, the appellant herein, and
respectfully petitions this Honorable Court for a
rehearing, and in that behalf represents as fol-
lows:

The decision herein was inadvertently render-
ed before the cause was submitted to the Court.

When the argument was had, counsel for the
appellees had not yet completed their brief, and
permission was asked to file a brief within a given
time after the argument. This request was granted
and the time then fixed within which the brief

should be filed was afterwards extended. After the brief of the appellees had been filed, an order was made giving counsel for appellant until February 18, 1917, to file a reply brief. This order escaped the attention of the Court and on February 6, 1917, before counsel had filed a reply brief, the decision was rendered.

This circumstance becomes important in connection with the consideration of a petition for rehearing, in view of the fact that the brief of appellees contained many inaccuracies, both in regard to the facts and the law applicable thereto. A failure to file a reply brief made it appear that all the statements contained in the brief of appellees, both in regard to the facts and the law, were confessedly correct, so that some of the inaccuracies contained in the brief naturally found their way into the decision of the Court.

Again, when the opening brief was prepared, all the arguments that might be advanced by the appellees could not be anticipated, nor could it be foretold what position the appellees would take with reference to the matters presented. It was supposed that the appellees would admit many of the things contended for by the appellant. The record was exceptionally long, and a detailed discussion of every portion of it would result in presenting many matters concerning which there was no issue. Accordingly, the errors relied upon for a reversal were pointed out without attempting to

anticipate anything that the appellees might advance, or attempting to discuss the effect of any position they might take. Had a reply brief been filed, the inaccuracies contained in the brief of appellees would not only have been pointed out, but it would have been shown that the contentions made, at least insofar as they were adopted by the Court, would not entitle the appellees to a decision affirming the decree of the lower Court.

In presenting the grounds and reasons relied upon for a rehearing, therefore, the inaccuracies contained in the brief of appellees, insofar as they found their way into the decision of the Court, will be pointed out and it will be further shown that because of the peculiar facts existing in the case, the decree of the trial Court should be reversed, even though the decision of this Court be regarded as correct in relation to the various matters of both fact and law referred to in the opinion.

The appellant and the appellee, the Ebner Gold Mining Company, are the owners of adjoining groups of mining claims, situate in the vicinity of Silver Bow Basin, near Juneau, Alaska.

Both groups contain deposits of low grade ore that have been worked in a small way for many years. While these activities were not highly profitable in themselves, they served to disclose the existence of ore bodies sufficiently large to admit of large scale operations, which, if properly conducted would so reduce costs as to leave a margin of prof-

it. Accordingly, as early as the year 1899, the appellant commenced formulating plans looking toward the construction of a large milling plant; one of the plans formulated was that of building such a plant on the shores of Gastineau Channel at tide-water and connecting it with the mine by means of a tramway constructed along the hillside until the portal of the present Gold Creek tunnel was reached, thence through a tunnel into the mine. Under this plan it was necessary that the waters of Gold Creek should be applied in connection with the operation of the mill to be constructed. In the year 1900, Mr. F. W. Bradley, now president of the appellant corporation, took charge of its operations; at that time the necessary locations to cover the right of way for the proposed tunnel and the right of way for such diverting works as might be necessary to apply the waters of Gold Creek had already been made. (See evidence, Bradley, record page 352.)

Because of the large outlay required to carry this plan into execution and the low grade character of the ore then disclosed, Mr. Bradley considered other plans for the operation of the plant, carrying forward in the meantime, the work of development and exploration. In the fall of the year 1909, however, he definitely decided to carry out the plan above outlined, and took active steps looking toward its execution. (See evidence Bradley, record page 353, et, seq.) (See evidence Kinzie,

record page 178, et seq.) On December 11, 1909, President Bradley wrote a letter to R. A. Kinzie, who was then acting as Superintendent of the appellant, directing him to locate the waters of Gold Creek at a point below the Ebner water-wheel and at an elevation of between four hundred and five hundred feet above sea level. (See evidence Bradley, record page 357.) (See also letter, page 1954 and letter enclosed therewith, record page 1955.)

Upon receipt of these instructions from President Bradley, Superintendent Kinzie consulted counsel to ascertain what steps were required to carry the directions of Mr. Bradley into effect, (See evidence Kinzie record page 244) and directed R. W. Wayland, who then had charge of the civil engineers in the employ of the company, to survey the flume route. This survey could not be made at that time because of the depth of the snow, but as soon as the weather would permit, Wayland directed one Lindsay, a surveyor working under him, to make the survey. (See evidence Wayland, record page 446.) Accordingly, in the early part of July, which in this locality is as early as that character of work can be carried on on the surface, a line was surveyed from a point on Gold Creek to the shore of Gastineau Channel. This line followed approximately along the same line that is now followed by the flume constructed by the Alaska Juneau Company. Thereupon the necessary rights of way were acquired or located for the proposed

flume and tramway. (See evidence Kinzie, record page 181, also pages 245 and 246.) This done the appellant was ready to go ahead with the construction of the flume, pipe line, etc. and a notice was posted by L. D. Mulligan on the banks of Gold Creek appropriating twenty thousand miners' inches of the waters flowing therein. This notice was posted on August 1, 1910, and Mulligan, in posting the same, was acting as an employee of the appellant and under the direction of its superintendent. (See evidence Kinzie, record page 182.)

Mulligan posted the notice at an indicated point, 150 feet below the mill building situated on the Lotta claim, as he was directed to do by the superintendent. (See evidence Mulligan, record page 444.)

It being the intention to post the notice below the lower side of the Lotta, President Bradley and Superintendent Kinzie measured the distance from the mill building on the Lotta to the lower side line of the claim along the course of the creek, using for that purpose the patent plat of the Lotta claim. (See evidence Kinzie, record page 309, also page 256.)

After testifying that he gave Mulligan definite instructions in relation to the point where the notice was to be posted, Superintendent Kinzie testified as follows:

"A." The point he was told to go to; he was told to measure off a number of feet,

starting at the new Ebner mill and going down Gold Creek; and I took the map and measured off the distance from the new Ebner mill to the lower side line of the Lotta claim—we measured that distance and told him to go up and measure down the creek the required distance, and be sure he went far enough to keep over the end line of the Lotta.”

By measuring 150 feet below the mill building along the course of the creek as platted on the official patent plat of the Lotta claim, a point would be reached well below the lower side line of claim. This distance was measured off on the plat and Mulligan directed to make the same measurement on the ground, and post his notice the required distance below the mill. This he did. It afterwards developed, however, that the creek was not correctly platted on the official patent plat; that instead of crossing the claim diagonally in almost a straight line as indicated on the patent plat, the creek made a turn and ran lengthwise with the claim for a considerable distance before crossing the lower boundary, so that if 150 feet were measured from the mill building along the course of the creek, a point would be reached on the Lotta claim a considerable distance above the point where the creek crosses the lower boundary. Mulligan, having taken his measurements in this way, posted the notice on the Lotta claim.

In this connection, the attention of the Court

is directed to appellees' Exhibit "S," found on page 2167 of the record, a map made by J. F. Wettrick, a surveyor in the employ of the appellees, in testifying upon cross examination in relation to Exhibit "S," with reference to the position of the Gold Creek as shown thereon, Mr. Wettrick testified as follows:

"Q" Did you survey that creek yourself, Mr. Wettrick?

"A" Yes, I ran a traverse up and down that creek.

"Q" You put that in yourself from actual measurements upon the ground?

"A" Yes.

"Q" It isn't as it is shown upon the patent plat?

"A" No, it isn't.

The witness was then asked to sketch upon Exhibit "S" the creek as it was platted upon the official plat. This he did, marking the point at which the creek entered the Lotta with the letter "A," and the point where it left the claim with the letter "B"; (these marks are rather indistinct upon the copy as Exhibit "S" appearing in the record, but they appear more plainly upon the original exhibit transmitted to this Court with the record.) (See evidence Wettrick, record page 654, et seq.)

The witness Lindsay, a surveyor in the employ of the appellant, marked on Exhibit "S" with the letter "Q2" the point where the Mulligan notice

would fall, if the creek, as located on the ground, were in the position shown on the official plat. (See evidence Lindsay record page 1429.) In regard to the point marked "Q2," the witness testified as follows:

"Q" That is how many feet below the southern line of the Lotta?

"A" Approximately 50 feet on this map. (See evidence Lindsay, record page 1430.)

The attention of this witness was then directed to the official plat of the Lotta, defendants' Exhibit "T," found on page 2168 of the record. The witness was asked to plat the mill on this exhibit and also to indicate the point where the Mulligan notice would be posted if posted 150 feet below the mill. This done, the witness testified as follows:

"A" It would throw the Mulligan notice on the point marked Y, on Exhibit "T."

"Q" Have you also located the mill on Exhibit "T?"

"A" I have.

"Q" Mark that with the word "mill." Witness does so.

"Q" How far below the Lotta line would the Mulligan notice be there?

"A" Somewhere about 25 or 30 feet. (See evidence Lindsay, record page 1432.) (The copy of Exhibit "T," as it appears on page 2168 is plainer than the copy of Exhibit "S." The Court's attention is therefore especially directed to it.)

The foregoing facts were not disputed by any witness called at the trial, and point out just how and why the Mulligan notice happened to be posted within the exterior boundaries of the Lotta claim. The Court was led to adopt an erroneous conclusion in regard to this matter. The appellant did not post its notice on the Lotta claim because it claimed any portion of that claim under the Oregon location. It may here, however, be noted that at the time the notice was posted it would have been a difficult matter to determine the exact location of the lower line of the Lotta. True, this line had been brushed out at one time, and it is possible that this brushed out line was still visible in 1910, and some old stakes were still in the ground although it might have been a difficult matter to find these because of the density of the brush, but the principal difficulty with the situation arose from the fact that this line so brushed out did not correspond with the southern boundary line of the claim as described in the patent, nor was the claim as marked upon the ground by the stakes so located as to in any manner correspond to the claim as described in the patent. (See evidence Stewart record page 1351 et seq., also 1394) (See also evidence Kinzie record page 662 et seq.)

In subsequent litigation the Court being satisfied that the stakes found in the ground were the original stakes, disregarded the description found in the patent and held that the claim as patent-

ed was the claim as marked by the stakes on the ground. This contention with reference to the location of the Lotta, however, had nothing to do with the posting of the Mulligan notice. In posting the notice the exact boundary between the Oregon claim and the Lotta claim was not considered. It was desired that the notice should be posted below the southerly boundary of the Lotta and the official patent plat of the Lotta was resorted to for the purpose of determining where it could be posted so as not to be on the Lotta claim. The fact that the notice was posted on the Lotta claim was due to a mistake that was made in platting the creek on the official plat and to nothing else.

In this connection it may be pointed out that the Court was also led to adopt an erroneous conclusion with reference to the point at which the Alaska Juneau dam was originally constructed. No dam was ever constructed on the Lotta, nor was any work looking toward the diversion of the waters of Gold Creek ever done on the Lotta. The dam as originally built was below the side line of the Lotta, and so was the intake to the flume. The decision of the Court would seem to indicate that the Court was led to adopt the belief that two dams were built, one on the Lotta and one below it; this is an error. The appellant never built but one dam; its position was never changed.

(See evidence Kinzie record pages 226 and 293)

See evidence Stewart record pages 1346 and 1388)

See evidence Lindsay record pages 852 and 856)

(See evidence Jones record page 490)

(See evidence Hendrick Hendrickson record page 1324)

(See evidence Eli Mackay record page 860)

(See evidence Arthur Kinzie, record 1329)

When the dam was originally constructed, more or less of the brush and timbers that were filled in behind it, extended over the line and were on the Lotta claim as the boundaries of that claim were subsequently determined to be by the Court. It is true a judgment was rendered adjudging the appellees to be the owners of the Lotta as described in the judgment and ordering the appellant to move therefrom; but there was nothing for this judgment to operate upon, except the filling in behind the dam above referred to, and this portion of the dam, if it may in fact be called a portion of the dam, was subsequently removed, but the dam and intake was left in the same position.

(See evidence Kinzie record page 293)

(See evidence Stewart record page 1347)

Prior to the time that appellant's notice was posted, however, the Ebner Company had also formulated plans looking toward the operation of its mine on a larger scale. Its original ten stamp mill, like the original mill of the Alaska Juneau Company, was found to be too small; at first five

stamps additional were added, and later in the year 1897 Mr. Ebner conceived a plan under which the property could be operated on a larger scale. The plan was to erect a new mill on the Lotta. That claim is situated above the intake of the Alaska Juneau flume, so that the use of the water at that point would not interfere with its use by appellant. A mill building sufficiently large to house forty stamps was erected at this point, but the stamps were never installed. (See evidence Ebner record page 1110.)

In the year 1902 negotiations were had between the appellant and the Ebner Company looking toward the purchase of the Ebner property by appellant.

A written report on the Ebner property was transmitted to Mr. Bradley at San Francisco, and in the winter of 1902 and 1903, Mr. Ebner, president of the Ebner Company, called on Mr. Bradley at that place. Because of the fact that Mr. Ebner's maps and data were in his room in the Occidental Hotel, Mr. Bradley went with him from his office to the room where the maps were, and a conference was there held. (See evidence Bradley record page 1632.) At that conference the parties had before them the report previously transmitted to Mr. Bradley (Ex. 38, record page 2003.) This report dealt with the mill building previously erected on the Lotta claim. According to it the equipment consisted among other things of a fifteen

stamp mill and a new mill building large enough to house forty stamps. Referring to the company's water rights, the report says:

"This water is conveyed by a four foot double lined flume from what is called the 'upper dam' to both the old and new mill. The head or pressure from tank to new mill is two hundred forty-six feet; at the old mill one hundred seventeen feet. At present the water is divided, being used at the old mill for operating the stamps and at the new mill for operating the compressor. As soon as the new mill is completed all water will be diverted and used under the high head."

(See record page 2007), and in relation to the company's future plans it is said:

"Tests made at different times for the last five years from different portions of the property have convinced this company that they have a very large mine of medium grade ore; and that in order to make it profitable it will require a large mill; and this company has concluded to do the following: That unless negotiations are closed within the time stated this company proposes to not only immediately install the machinery in the new mill building, but to immediately commence work and extend the mill site for the installation of sixty stamps more, making a hundred stamp mill instead of forty."

(See evidence record page 2008.)

They also had before them the maps of the

underground workings, etc. Mr. Ebner at that time represented to Mr. Bradley the purpose of the new mill site on the Lotta ground where, he said, a building had been erected to contain forty stamps and where grading had been begun with a view of adding sixty additional stamps. Mr. Ebner told Mr. Bradley at this time that he was either going to sell the property or was going to raise the money to build the one hundred stamp mill, and that he would give Mr. Bradley an opportunity to buy, if after an examination he wanted it (See evidence Bradley record page 1635). An examination of the property was made, which disclosed the fact that the ore was of the same character as that contained in the Alaska Juneau mine. Mr. Bradley already owned a sufficient quantity of this character of ore, and since the plans of the Ebner Company were such that its use of the waters of Gold Creek would not interfere with the use of the waters by the Alaska Juneau Company, the location of the contemplated new mill on the Lotta claim being above the point where the latter company would divert the water if its plans were carried out, the property was not purchased. Referring to the effect of Mr. Ebner's representations in relation to the site for the one hundred stamp mill and the proposed use of the water, Mr. Bradley on pages 1637 and 1638 testified as follows:

“A” I had these negotiations with Mr.

Ebner and went to the expense of having the Ebner property examined, believing that it might be a desirable outlet for the Alaska Juneau property; and after knowing the plans, learning the plans of the Ebner Gold Mining Company, and after learning that their ore was of a similar character to ours, I saw no advantage in purchasing the property, because we had sufficient ore of our own, and we could pick up the water after they turned it back into the creek. We had sufficient ore of our own, and I came to the conclusion for the Alaska Juneau Company that there was no need of purchasing more ore of the same character; we know just where the Ebner Company would drop the water in Gold Creek and where they would drop it and for our own needs we could pick it up below where they dropped it."

"Q" Then what did you do pursuant to that?"

"A" I went to work maturing our own plans for carrying out the general development and equipment of our property that is now under way."

There after according to the testimony of Mr. Ebner, he also had in mind other plans. One was to build a mill in the vicinity of Shady Bend, although he testified that he had not fully decided whether that was the correct place for a very large mill. Another plan was to erect a mill on the shore of the channel and some negotiations were had once with Captain Johnson looking toward the

purchase of a piece of ground on the beach for that purpose.

(See evidence Ebner, page 1122.)

Nothing, however, was done toward carrying either of these plans into execution while Mr. Ebner had charge of the property. In the year 1908 Mr. Ebner made a contract with one Underwood for the sale of his stock in the Ebner Company; the exact terms of this contract are not disclosed by the evidence. (See evidence Ebner, record page, 1087) but the testimony of Mr. Ebner was to the effect that he was not paid for this stock until about two years before the trial, which was had in June, 1914. (See evidence Ebner record page 1199). Active operations were discontinued on the property in the year 1897. (See evidence Ebner, record, page 1124.)

After the contract for the sale of Ebner's stock to Underwood had been executed, Underwood employed one H. T. Tripp to examine the property, sample it and report to him among other things in relation to a plan to operate the property on a larger scale. Tripp conceived of three distinct plans; one contemplated the erection of a mill at the point on the Lotta where Mr. Ebner had previously constructed a mill building to house forty stamps; the other contemplated the erection of a mill building at a point near where the Alaska Juneau bunk house was since constructed; and a still further plan contemplated the erection of a

mill building further down Gold Creek canyon at a point between Cape Horn and the Lotta claim, a short distance above the locality where the Mackay grade was since made. Tripp advised Mr. Underwood of each of these three plans. (See evidence Tripp, record, page 546 et seq.)

Summing up the testimony on this point, Mr. Tripp testified on page 551 as follows:

“Q. You didn’t know at this time of any decision having been reached by the company that you were working for, or anyone else in that connection, as to the point where the new mill was to be built, when you left the employ of the company on August 3, 1910?”

“A. No, I don’t think I did; that was about the time Bent got in and went to managing affairs, and I don’t think I knew just what they were going to do.”

And again on page 552 Tripp testified:

“Q. All you know is, Mr. Tripp, that there were at least three places under consideration; one the Lotta; one where the Alaska Juneau bunk house is built, and one near where Mr. Mackay started his excavation up the creek a little way?”

“A. I know they had all been reported on.”

While Tripp was so employed he posted a notice under which he claimed the right to appropriate ten thousand inches of the waters of Gold Creek. This notice was posted at the old Ebner dam previously built to supply water for the op-

eration of the original ten stamp mill, on the south side of the Creek at the intake of the flume.

The original notice was written with a carpenter's pencil, and a piece of carbon paper used to make a carbon copy; the carbon copy so made, signed by H. T. Tripp, was posted on June 20, 1910. (See evidence Tripp, record page, 519, et seq.)

The point at which the notice was posted is situated on the Crown Point patented lode claim, the property of the Ebner Company. A public road leading from Juneau to Silver Bow Basin passed one hundred and fifty feet from the Ebner dam, but the brush in the neighborhood was so thick that the dam was not visible from the public road at that point; the dam could, however, be seen from one point on the public road about four or five hundred feet distant from the dam. There was no public road nearer to the dam than this road, upon this point Mr. Tripp testified on page 560, as follows:

"Q. The public road is some distance over the creek from the Ebner dam, isn't it?"

"A. Yes, sir."

"Q. There was no public road near the Ebner dam, was there?"

"A. No nearer than the public road."

"Q. That is called the Basin Road?"

"A. Yes."

"Q. That is probably one hundred feet from the dam at the nearest point?"

"A. Somewhere near that, I guess."

The witness then testified that the dam could be seen at one point on the road which was perhaps four hundred or five hundred feet from the dam. He also testified that from that distance one traveling along the road could not tell anything about the pasted notice. The testimony is:

"Q. Now, if that were posted four or five hundred feet away, and the conditions of the ground there, you don't pretend to say that anybody going up could see that Mr. Tripp had located a water right there?"

"A. I don't think they could read it at that distance."

"Q. Nor tell what kind of a piece of paper it was?"

"A. Couldn't say whether it was a carbon copy or not."

"Q. Or whether it was a carbon copy of anything could they?"

"A. No."

"Q. Or whether it was a blank piece of paper?"

"A. I don't think they could tell anything about it."

"Q. That is the only point from the public road from which is it visible, as far as you know; that is, right, isn't it?"

"A. Yes."

(See evidence Tripp, record page 562.)

This notice so posted by Mr. Tripp on June 20, 1910, was torn down during the latter part

of July, 1910. Upon that question, Mr. Tripp testified as follows, page 579 et seq.

“Q. Judge Winn asked you for the notice, didn’t he?”

“A. He asked me before I left, but I couldn’t find it.”

“Q. Didn’t know what had happened to it?”

“A. Didn’t know where I put it.”

“Q. Why didn’t you go and get another copy off the posted notice?”

“A. Because the posted copy was torn down.”

“Q. This was the only notice that was left—the copy you had, is that right?”

“A. The notice had been torn down somewhere about the last of July.”

Nor was the notice recorded until the following October. When Mr. Tripp returned from a trip to the westward he found the original notice in his safe in the C. W. Young & Company’s building and thereafter it was recorded. (See evidence Tripp, record page 579-580.)

Tripp left the employ of the California-Nevada Copper Company and Mr. Underwood on August 3, 1910. Up to that time no work had been done looking toward the appropriation of the waters of Gold Creek under the notice that had been posted. On page 562 Mr. Tripp testified as follows:

“Q. Now, you never did any work look-

ing toward the appropriation of water from Gold Creek under that notice up to the 3d of August, 1910, did you?"

"A. No, I didn't do any work."

And further on the same page he testified:

"Q. Up to the 3d of August, 1910, then, there had been no work done under that notice?"

"A. No."

"Q. That was the day you left?"

"A. Yes."

At the time of posting this notice both Mr. Tripp and his employer, Underwood, were familiar with the plans of the Alaska Juneau Company; on page 563 Mr. Tripp testified as follows:

"Q. At the time you were employed by Mr. Underwood both you and Mr. Underwood knew about the plans of the Alaska Juneau Company about building a mill on the beach, didn't you?"

"A. I suppose so."

"Q. The letter of October 3, 1909—under date of September 23, 1909, Mr. Ebner wrote to you as follows: 'A tunnel from the beach to the Ebner would not be justified except that the Alaska Juneau or other property in the upper basin should come under the same control; believe in that case a tunnel should be run through the ground that the Alaska Juneau has acquired for that purpose and have location for outlet and mill sites about half mile below Juneau on the beach?'"

"A. That is from me to Underwood."

"Q. That is a letter you wrote to Underwood on that date, is that right?"

"A. Yes, sir."

There is no evidence that the Alaska Juneau Company or any of its officers had on August 1, 1910, or for some time thereafter, any knowledge or information in regard to the Tripp notice or the claim made by Mr. Tripp or his employers, or the Ebner Company, if any, to divert the waters of Gold Creek and convey them to a point below the site of the Alaska Juneau dam; on the contrary, both President Bradley and Superintendent Kinzie testified that they had no such knowledge. On page 1639 President Bradley in relation to this matter testified as follows:

"Q. Now, in 1910, at the time this water location was posted by Mr. Mulligan, the first of August, 1910, did you have any knowledge that Mr. Tripp had posted any notice on the Ebner dam, or elsewhere?"

"A. No."

"Q. Did you have any knowledge that the Ebner Company, or Mr. Tripp, or the California-Nevada Copper Company, or any one connected with those people, laid any claim to any part of the water of Gold Creek above your intake?"

"A. No."

"Q. I mean laid any claim to any part of the water of Gold Creek that would interfere with your taking the water at your intake?"

"A. No."

On page 1530 Superintendent Kinzie testifies as follows:

"Q. Now, on the 1st of August, 1910, did you or your company, or anyone that you had in your employ or that was connected with the Alaska Juneau Company, know that Mr. Tripp had posted a notice on the Ebner flume, or any other place, appropriating the water?"

"A. I had never heard of such notice."

"Q. When was the first time, Mr. Kinzie, that you heard of it?"

"A. Some time during the month of October, I think, of 1910, was the first I heard of the Tripp notice."

And on page 1533 the same witness testified as follows:

"Q. Had you any information in August, 1910, concerning any enlarged mill construction and mine development of the Ebner Company contemplating a large mill, other than that connected with the construction of an enlarged mill on the Lotta claim?"

"A. I had not."

Not only did the officers of the appellant company not have any knowledge of the existence of the Tripp notice, but they had no knowledge of any plans in contemplation of the appellees, or any of them, under which the waters of Gold Creek were to be carried to a point below the Alaska Juneau dam. The only plans they knew of were the plans communicated to Mr. Bradley by Mr.

Ebner, in accordance with which an enlarged mill was to be operated on the Lotta claim and the waters used in such a manner as not to interfere with their use by the appellant.

Nor could they have any knowledge on August 1, 1910, of a plan to appropriate the water to be used in a mill at Shady Bend, for such a plan had not then been formulated.

Several persons interested in the California-Nevada Copper Company arrived in Juneau along about the latter part of July, 1910, and Angus Mackay, the superintendent in charge of the work done by the company, testified on page 719 as follows:

“Q. When you came here, it wasn’t until the 3d of August, that you went upon the ground?”

“A. Third of August.”

“Q. You and Mr. Bent and O’Boyle and Hill and Wettrick and some others, is that right?”

“A. Yes, sir.”

On pages 728-729 and 730 the witness testified that the three mill sites reported on by Tripp were visited by the Mackay-Bent party on August 3d, and on page 721 he testified that on August 6th it was finally decided to build the mill on the present Mackay grade. Upon this point the testimony is as follows:

“Q. About the 6th of August you decid-

ed you would put the mill down where they made the grade, is that right?"

"A. It was fully decided about that time."

"Q. Sixth of August, 1910, isn't it?"

"A. Yes."

While Mr. Mackay testified that they had decided to build a mill at the site of the Mackay grade on August 6th, Mr. Muir who had charge of the work at that time of the trial, testified that even at that time the plans of the company in that regard were uncertain. His testimony on that subject as it occurs on page 1153 is as follows:

"Q. You never expected to build a mill, Mr. Muir, of any size at the point where this grade is immediately below that slide, did you, Mr. Muir?"

"A. Before we determined what we were going to do we are going to run the five stamp mill far enough so mineralogically, we will know what we have there."

"Q. You are first going to find out what kind of a mill you want, and then you will decide on where you are going to build it—is that right?"

"A. That is presumably the process to be followed."

"Q. But you have no intention or no idea of building a mill immediately below that slide, have you?"

"A. I couldn't say, Mr. Hellenthal, whether we have any intention or not."

The Court in the opinion refers to a letter from Tripp to Ebner as evidence of the fact that Tripp at the time of writing the letter already contemplated the construction of a mill on the Cape Horn No. 2 claim. In that letter it is stated that Tripp and Ebner had agreed that the Cape Horn No. 2 was a proper location for a tunnel to the Ebner mine. This had nothing to do with the location of a mill. The tunnel was as useful in connection with a mill built on the Lotta as with a mill built on the Cape Horn No. 2. To this latter fact the Court's attention was not directed and this no doubt accounts for the adoption of the erroneous conclusion. (See evidence Bradley, record page 1644 and evidence Kinzie, record page 1529-1530.)

Not only this, but the site of the Mackay grade was so unsuitable as a site for a mill that no one having a knowledge of mining would ever suspect that anyone would plan to erect a mill here and convey water to it. President Bradley, who all will concede, occupies a place in the foremost rank among mining engineers, testified that the Mackay grade at Shady Bend was not a safe place to build a mill and that the site on the Lotta claim on the other hand was safe and suitable; on page 1643 President Bradley testified as follows:

“Q. Now, I want you to explain to the Court fully why it is not a safe place.”

“A. There was a rock slide in 1901 or 1902, came from the mountain side on the west

side of Gold Creek immediately down Gold Creek below the mill site, and the mountain side is still cracked, and the cracks are growing wider, and there is every indication that there will be another rock slide that will cover this mill site."

"Q. The point where the mountain slide is cracked and growing wider—where is that with reference to the mill site?"

"A. Back of the mill site and immediately above it."

"Q. So that if there should be another slide at the point where the cracks are widening, where would that come down?"

"A. Would come down on the mill site—by mill site, I mean the place that Mackay graded off."

"Q. You don't mean to testify that it is a mill site?"

"A. No."

"Q. What is the character of the ground on the Lotta claim with reference to its suitability as a point for the construction of a mill?"

"A. A one hundred stamp mill on the Lotta claim is a safe and suitable place."

Mr. Bradley further testified concerning the tunnel that had been started on the Cape Horn as follows, page 1644:

"Q. But the fact of that tunnel being driven there, would that be any indication to you or anyone else going up there that a mill was to be built at Cape Horn, or in that vic-

inity—by Cape Horn, I mean Shady Bend?”

“A. No.”

“Q. The tunnel would be equally suitable for a mill on the Lotta claim?”

“A. It would be, yes.”

Upon this same question Superintendent Kinzie testified as follows:

(See evidence Kinzie record, pages 1525, 1526, et seq.)

“Q. Is that point such a point as in your opinion, as an engineer, can be utilized as a site for a stamp mill?”

“A. I consider it a most unsuitable place; in fact, I think it would be criminal to put a mill there and allow anyone to work in it.”

“Q. I wish you would explain to the Court fully the conditions above that point and surrounding that point, as a mill site.”

“A. The ground, that is, the mountain just back of the mill is all cracked and broken up; there are slides occurring at intervals of about two years, in fact, there was a slide came down last winter that cut off the point of the present grade; you can see it by standing on the grade itself; there are cracks two and three and four feet wide showing in all directions in the cliff just above the present site of the mill; that is one thing that would make it extremely dangerous for a stamp mill to be placed there. Another reason why it is not a suitable place is because all that has been done is to dig out some loose earth from that old slide and throw this earth over the

bank, and there is no provision made, nor do I think it is within reason to expect any suitable foundation for stamps to be placed on the site as graded out at the present time; it is nothing more or less than a lot of loose dirt that came down in a recent slide."

"Q. Could the grading that has been done there serve any useful purpose for legitimate mining operations?"

"A. No, it could not."

Exhibits numbers 62 and 63 are photographs of rock slides that occurred in the vicinity of the Mackay grade. These exhibits are explained by the witness Kinzie on pages 1527 and 1528.

On pages 1529 and 1530 Kinzie testified that the tunnel which had been started would be as useful in connection with a mill built on the Lotta as one built on Shady Bend and fully explains his reasons for so stating. The witness also at the same place testified that he considered the mill site on the Lotta a suitable one.

The conditions on the ground, therefore, on August 1, 1910, were not such as to indicate that the Ebner Company might intend to convey water to Shady Bend, but were such as to indicate that no one would have any such intention.

On that date the situation was this: Tripp had posted a notice on the patented property of the Ebner Company, where no one, not connected with that company had a right to go, so that no one not a trespasser could gain any information

in regard to it, for the notice had not been recorded. The original of the notice so posted was locked in the safe of Mr. Tripp, and he having forgotten that he had placed it there, no one knew where it was. During the latter part of July, the posted notice was torn down. On August 1, 1910, neither the appellant nor its officers had any actual knowledge concerning the Tripp notice; on that date it could acquire no actual knowledge concerning the notice posted, because that notice no longer existed, it had been torn down. The notice was not recorded until October 25th, so that on August 1st the appellant could not be charged with constructive knowledge. The situation was such that Tripp himself could not inform Judge Winn in regard to the notice. The posted copy had been torn down; he had mislaid the original; and he had not recorded it. (See evidence Tripp record, page 579.)

Furthermore, the facts and circumstances surrounding the case on August 1, 1910, were such that even though the Tripp notice had been regularly posted and recorded, and knowledge of its contents brought home to the appellant, it could not be charged with knowledge of the fact that it was the intention of the Ebner Company to convey the waters of Gold Creek to Shady Bend or any point below the Alaska Juneau dam. Aside from the fact that the Ebner Company had at that time no intention to convey the water to Shady

Bend, it having not yet been decided to build a mill there, the notice does not state that the water was to be taken to Shady Bend, but on the contrary that it was to be applied at the Ebner mine.

On August 1, 1910, the southerly side line of the Lotta marked the lower boundary line of the Ebner property. The Parrish No. 2 had at that time no existence either in law or in fact. Its attempted location was made in 1899 and for ten years following no assessment work had been done on it. (See Finding No. 6, Ebner, etc. Co. vs. Alaska Juneau etc. Co. No. 835, record pages 123 and 124). This finding reads as follows:

"The Court further finds that no assessment work required by law to the extent of \$100 each year has been performed or caused to be performed in labor and improvements of any kind or for the benefit and use of said Parrish No. 2 claim prior to the year 1909, and that the plaintiff and its grantors failed and neglected to sufficiently represent said claim during the years prior to 1909, after its attempted location in 1899."

Under the laws of Alaska the right to resume work does not exist; failure to do the assessment work during any one year restores the ground claimed to the public domain. (See Ebner etc. Co. vs. Alaska Juneau etc. Co. 210 Fed. 599). Furthermore, no discovery had ever been made on the Par-

rish No. 2. (See finding No. 5, page 123, No. 835.)
reading in part as follows:

“That the ground claimed by the plaintiff as the Parrish No. 2 lode mining claim was located solely for the purposes of convenience; that no discovery of mineral-bearing rock in place, of any value, was ever made by the plaintiff or its grantors nor any indication or evidence of such as could or would warrant or justify one in spending time, work or money in its development or in the expectation of finding ore.”

Nor was the Parrish No. 2 in the possession of the Ebner Company.

Finding of Fact No. 5, in Case No. 835—A reads as follows:

“That the plaintiff (meaning the Ebner Gold Mining Company which was the plaintiff in that cause) is not and never has been seized, possessed or entitled to the possession of that certain tract of ground described in paragraph three of the second clause of action set forth in the amended complaint herein and known and referred to as the Parrish No. 2 lode mining claim.”

The findings in this case were made on June 12, 1911, the cause appealed to this Court where the findings were approved and the judgment affirmed.

There is no evidence in the record tending to prove that on August 1, 1910, the appellees, or any of them were in possession of the ground

embraced in the Parrish No. 2 claim. Whatever statements were contained in the brief which gave the Court the impression that this was the fact, were erroneous.

However, the situation with reference to the Parrish No. 2 is not at all important, because it is not to the Parrish No. 2 that the appellees seek to convey the waters of Gold Creek, but to the Cape Horn No. 2.

It was claimed in the appellees brief that this claim was on August 1st, in fact, the property of the Ebner Company, although located in the name of Ebner. The absence of a reply brief pointing out the testimony in relation to this matter seems to have led to the adoption of this view by the Court. This, however, is not the fact.

The Cape Horn and Eureka Lode claims were located by Ebner, Fred Micho and George Duke. (See location notices, pages 2231 and 2232.) The Cape Horn mill site was located later on by Ebner and one Lovett. (See notice record page 2221) for use in connection with the Cape Horn and not for use in connection with the properties of the Ebner Company. On page 1119 Mr. Ebner testified on this point as follows:

“Q. But anyhow the Cape Horn Mill Site was located in connection with this Cape Horn and this Eureka Lode?”

A. “Yes, sir.”

“Q. By you and Mr. Lovett?”

"A. Yes, sir."

"Q. Lovett was interested in them?"

"A. Lovett was my partner in any location that I made."

"Q. You were mining partners together?"

"A. We were mining partners."

On page 2254 occurs a notice of forfeiture signed by Ebner and Wilson directed to Anna Zimmerly in which it is stated that assessment work done on the Cape Horn was also intended to hold the Cape Horn mill site, showing that the mill site was attached to the lode claim by the same name.

The different interests in the lode claim and mill site were freely conveyed, sold and transferred from time to time. They were dealt with not as the property of the Ebner Company, but as the property of the locators and holders; (see deed, Duke to Zimmerly, 1-3 interest Cape Horn Lode and Eureka Lode, July 15, 1896, record page 2234; deed, August 29, 1896, Micho to Ebner, 1-3 interest Cape Horn and Eureka lode claims, record page 2237; deed July 15, 1896, Zimmerly to Ebner, 1-3 interest Cape Horn and Eureka lode claims, record page 2240; deed February 18, 1897, Ebner to Lovett, 1-3 interest Cape Horn and Eureka lode claims, record page 2244; deed February 18, 1897, Ebner to Wilson, 1-3 interest Cape Horn and Eureka lode claims, 1-6 interest in Cape Horn and Eureka mill sites, record page 2246; deed October 5, 1900, Lovett to Zimmerly, 1-3 interest Cape Horn and Eureka lode

claims; also 1-3 interest Cape Horn and Eureka mill sites, record page 2248; deed, Wilson to Ebner all grantors interest Cape Horn and Eureka lode claims, and Cape Horn and Eureka mill sites, record page 2251.)

Later on when Ebner found quartz stringers on the millsite, he located the Cape Horn No. 2 over the millsite, not in the name of the Ebner Gold Mining Company, but in his own name. Mr. Ebner was interested in the Ebner Company, but he was also interested in other properties including the Dora group adjoining the Ebner group. During all the time he was in Alaska he was a miner and prospector. He was interested not only in the vicinity of Juneau, but also at Windham Bay and he and his prospectors located claims there. (See evidence Ebner record page 1718 et seq.) If, at the time of the location of the Cape Horn No. 2, Ebner had not acquired the interests of his partners in the millsite over which the claim was laid, the law would raise a resulting trust in favor of his partners, but the Ebner Gold Mining Company had never been his partner in this location any more than the Dora Company or the company operating at Windham Bay. Nor does Ebner claim anything to the contrary. In his letter to Tripp, to which the Court refers, he sneaks of the claim as his property, which he is calculating to sell to Underwood and in his testimony record page 1117, he says.

"Q. You located them for your own use;

they were not located as the property of the Ebner Company, were they?"

"A. They were located as my own property, but with the view that they were to go in as the Ebner property, when we drove that long tunnel."

"Q. They were located for your own use and as your own property, were they not?"

"A. Of course, if you look at it that way."

"Q. And before the Ebner Company had a right to them, they would have to buy you out?"

"A. Would have to buy me out? I would do the same with the Ebner Company as I did with Underwood—I said, 'Here are the claims and here are my plans, you better have all the claims so you can go ahead.'"

And when a right of way was sold to the Jualpa Company that extended in part over the property of the Ebner Company and in part over the Cape Horn, the money was divided between the Ebner Company on the one hand and Ebner and his partners on the other. (See evidence Ebner, record, page 1118.) Mr. Ebner testified that it was his intention that he and his partners should some time dispose of their interests to the company but this intention remained locked up in the breast of Ebner.

Nor would it effect the case if Ebner had been the trustee holding this property for the benefit of the company. One reading the Tripp notice would not be charged with knowledge of things not evidenced by anything appearing in the public records

and otherwise unknown to him. In construing the Tripp notice he would have a right to assume that the Ebner property was what, available information such as the public records, disclosed it to be.

This is especially true in the light of the evidence, on page 1531. Superintendent Kinzie in relation to this matter testified as follows:

“Q. Now, on the 1st of August, 1910, had you any knowledge or information, or did you know of any property—any other mining property—further down the creek than the lower side line of the Lotta?”

“A. I did not.”

The notice was posted at the intake of the old flume, indicating an intention of taking the water at that point and conveying it along the southerly side of the creek as indicated in the notice. The Ebner Company had selected a mill site on the Lotta claim above appellant's intake; had there constructed a building to be used for a new and enlarged mill to take the place of the small fifteen stamp mill which had theretofore been operated. To reach this millsite the water would naturally be diverted at the point where the notice was posted and conveyed along the southerly side of the creek until the millsite was reached. The plans of the Ebner Company in this regard had been communicated to appellant; and appellant, relying upon the On that day, also, lumber was purchased for the construction of a bunk house.. (See evidence Simpson, record page 468.) This lumber was placed on

information thus conveyed to it, appropriated the water at a point below the Lotta so that its use by appellant would not interfere with its use by the Ebner Company.

Not only did the conditions on the ground indicate an intention to carry out the plans communicated to appellant but there was not the slightest evidence that these plans ever had been changed.

It is said by the Court in the opinion that the posting of the notice indicated an intention not to use the water at the old stamp mill, since the water had already been used at that mill. No fault can be found with this conclusion, except that the notice might indicate an intention to enlarge an existing water right or to renew a water right lost by abandonment. But, however, correct the conclusion of the Court is in this regard, it does not effect the force of the contention made, which because of a failure to file a reply brief, was not pointed out as clearly as it otherwise would have been. It is not contended that the posting of the notice at the intake to the old flume indicated an intention to apply the water to the old fifteen stamp mill, but at the mill site on the Lotta in connection with the operation of an enlarged mill, the building for which had already been constructed at least in part, although the stamps had as yet not been installed. The water had been applied at the fifteen stamp mill, but water was necessary to operate the new mill on the Lotta and this required an additional

appropriation, because this new mill had not yet been completed.

At this point it must be observed that Tripp and his employer, as has already been pointed out, knew all about the plans of the appellant, and as a mining engineer Tripp knew how essential it was to the successful consummation of these plans that appellant should be able to appropriate and apply the water of Gold Creek, for from no other source could a supply of fresh water be secured. He also knew that the indications on the ground evidenced an intention on the part of the Ebner Company to use the water sought to be appropriated at the new mill site on the Lotta. Clearly if it was his intention to use the water below that point, he should have so stated in his notice in unmistakable terms, especially so since the location of Shady Bend was so unsuitable as a site for a mill that no one would be warranted in suspecting that anyone ever contemplated the erection of a mill there.

Under these circumstances the Alaska Juneau Company posted its notices and initiated its right. On the same day that the notice was posted, work was commenced, looking toward the diversion of the waters from the creek and their application to the beneficial uses designed.

The canyon of Gold Creek in the vicinity where the notice was posted was very rugged and precipitous and wherever level spots occurred they were covered with a very heavy growth of alder brush.

The conditions were such that men could not go back and forth, either to the proposed dam site or the flume route in that vicinity until trails had been made and steps cut in the rocky cliffs, nor could materials, necessary for the construction of the dam be brought there, until this preliminary work had been done. In addition to this, there was no place to house the men until a bunk house had been built. (See evidence Kinzie, record, page 183 et seq.) (See evidence Harri, record page 393.)

One O. M. Harri was placed in charge of this work and authorized to employ additional men as fast as he could use them. (See evidence Kinzie, record page 187). On August 1, 1910, the same day on which the notice was posted, Harri went upon the ground and commenced the preliminary work of building trails, making arrangements for the construction of a bunk house and doing such other things as were necessary before actual work on the construction of the dam and flume could be prosecuted. (See evidence Harri, record page 390 et seq.)

On August 2d, Harri commenced placing additional men at work and continued doing so from that time on, pressing the work forward as speedily as possible. (See evidence Harri, record page 393, et seq; also evidence Kinzie, record page 189). the ground on the fourth, fifth, and sixth, it having been taken from the James saw mill on Douglas Island, across the channel to Juneau and thence

by wagon up the creek. (See evidence Lynn, record page 424.) As corroborating the evidence of Harri and Superintendent Kinzie on this point, Russell Casey testified on page 430 that he commenced brushing out the road leading to the dam site on August 2d, and on page 432 he testified that two other men, one named Sandy Hilton and the other named Cash Cole assisted after he had been there a day or so. The witness Cash Cole testified on page 461 that he commenced work in the early part of August.

The witness Dempsey testified that in the early part of August, about the sixth, he commenced work building a small bunk house and that while he was working there, others built a small blacksmith shop. (See evidence Dempsey, record page 464 et seq.)

The witness Hilton testified that he commenced work on the 3d of August. (See page 437.)

From that time on the work was carried forward continuously and without cessation or delay until the water was applied to use on November 17th. As many as fifty or sixty men were employed one time when the work had so far progressed that the employment of that number of men was practical. (See evidence Kinzie, record page 189 et seq.) During the entire progress of the work as many men were employed as could be employed to advantage. Touching this question Superintendent Kinzie testified:

"We worked every man we could advantageously work at all times from the time the water was first appropriated to the time the water was put to use."

(See evidence Kinzie record page 191.)

The preliminary work was completed by the first of September and at that time work on the flume was commenced. The witness Kinzie testified that this work was commenced in the early part of September. He was then interrogated in relation to the continuous character of the work previously done. Upon this subject he testified as follows:

"Q. Prior to this time had there been any intermission in the work?"

"A. There was no intermission in the work."

"Q. Work had been carried on continuously in the vicinity of the point of diversion, in the way of preliminary work?"

"A. Work had been carried on from the point where the water was to be diverted to a point just below Snow Slide Gulch."

"Q. This work was all in the vicinity of the point of diversion?"

"A. It was all in the immediate vicinity of the point of diversion, yes, sir."

"Q. And that had been carried on daily and continuously from the first of August up to the time we now speak of?"

"A. Continuously."

The same witness then testified in detail how

the work was continued from day to day until the water was applied to use on November 17th. (See evidence Kinzie, record page 193 et seq.) Photographs showing the progress of the work were offered in evidence and explained by the witness, and also photographs showing the damage done to the flume and dam of the appellant by those in the employ of the appellees, who resorted to the use of dynamite and large boulders, for that purpose, seeking by these methods to delay and retard the work.

The continuous character of the work is best evidenced by the expenditures made. In August, 1910, \$368.02 was expended; in September of the same year \$346.98 was expended. During this same month tunnels were driven in connection with the establishment of a flume grade, but this work was done by contract and does not appear in this total. During the month of October of the same year \$3,328.43 was expended and in the following month, the month of November, this being the month when the water was first applied to use at the Snow Slide Gulch compressor, \$4,996.93 was expended.

The first use made of the water on November 17th was in connection with the driving of a compressor plant situated in the vicinity of Snow Slide Gulch and from that day forward the work looking toward the application to use of the water on the Gastineau Channel mill site was carried on continuously until the water was there actually applied.

Upon that question the witness Kinzie testified:
(See evidence Kinzie, record page 205 et seq.)

"Q. Now, after putting the water to use at the Snow Slide Gulch compressor, what, if anything, did you do from then on toward completing the flume line—the flume to the mill site on the shore of Gastineau Channel?"

"A. The work of grading and building the flume line and also the necessary tunnels was carried on continuously from that time to the time that the water was put to use on the mill site on Gastineau Channel, which is the same mill site now occupied by the Alaska Juneau Company's mill."

"Q. When was the water put to use on those mill sites?"

"A. That was in the spring of 1913."

"Q. To what use was it then applied?"

"A. It was first applied to the hydraulicing of the dirt from the hillside, for the foundation of the mill."

"Q. To what extent was the water applied at that time—the entire capacity of the flume or less?"

"A. Practically the entire capacity of the flume was used."

"Q. For that purpose at that time?"

"A. It was."

"Q. To what extent, if at all, was the water used on the mill site since?"

"A. The water has been used continuously since that time."

"Q. On the mill site?"

"A. Yes."

The total amount of expenditures in connection with the appropriation of the water and its application to the Snow Slide Gulch compressor and to the mining operations on the mill site amounted to \$98,826.14. (See evidence Kinzie, record page 503 et seq.) During this period the total amount expended by the company in connection with its operations exceeded \$1,000,000.00 (See evidence Kinzie, record page 212.)

On the 25th day of August, 1910, a suit was commenced by the Ebner Gold Mining Company, appellee, against appellant. In that suit a complaint was filed, alleging that Mulligan had posted a notice on the Lotta claim on or about the 27th day of July, 1910; that the appellee was the owner of the Lotta and Parrish Nos. 1 and 2 claims, and that ever since the 27th day of July, 1910, appellant had continuously trespassed upon the property of the appellee.

The language of the complaint is, that the defendants in that suit

“have been since said time (meaning the date of the posting of the Mulligan notice) continuously, wilfully and maliciously trespassing upon property of the plaintiff company.”

And further on in the same document, it is stated:

“And have been removing the timber therefrom and clearing up what appears to be a right of way for flume, ditch or pipe-line to

convey water from said Gold Creek from the point of posting said notice above referred to, in and over and upon the said last mentioned lode claims, and off of and away from the premises and mining claims of this plaintiff company.”

(See record page 1966.)

And the eighth paragraph contained in said complaint, reads as follows:

“That said defendants are constantly and daily performing and doing the acts and things therein complained of, and have been so doing said acts and things since on or about 27th day of July A. D., 1910, and are threatening to carry out their said purpose and accomplish the things complained of herein, and will do so unless restrained immediately by this Honorable Court.”

(See record page 1968.)

In the prayer of the complaint the Court is asked, among other things, to enjoin the appellant from diverting the waters of Gold Creek. A preliminary injunction was asked for and after a hearing had, this application was denied by the Court.

Commencing on or about the 6th of August, the California-Nevada Copper Company commenced doing preliminary work, looking toward the construction of a flume from the Ebner dam to Shady Bend along the north side of the creek and after the preliminary work was done, work in connection with actual flume construction work was carried on more or less spasmodically until the fall of

1913. The flume was completed to the mill site in the month of December of the year 1910, except that a nine-inch board was placed thereon two years later, the penstock was put in and the flume connected with it in 1911. (See evidence Mackay, record page 1191.) No attempt was made to apply the water to use until the water had not only been applied by appellant at Snow Slide Gulch, but also on the mill site on Gastineau Channel.

The Trial Court made a finding which reads as follows:

“That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was posted, and after actual diversion of the water at such point, did the plaintiff do anything that would give notice to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek.”

It is difficult to say upon what theory of the facts the Trial Court based this finding.

The evidence is undisputed, that the work was commenced by appellant on August 1st, and carried on continuously thereafter as above indicated.

The complaint filed in this suit on August 25th shows not only that the appellee knew that the work had been carried on continuously on the ground from day to day, but also shows that the

work was of such a character as to clearly indicate its purpose for it is said in this complaint that the appellant was "clearing up what appears to be a right of way for flume, ditch or pipe line to convey water from said Gold Creek."

And also

"that said defendants are constantly and daily performing and doing the acts and things therein complained of, and have been doing such acts and things since on or about the 27th day of July, 1910."

That the work had been carried on daily and continuously, therefore, and that it was of such a character as to apprise the appellee of its object and purpose, is evidenced by the undisputed evidence of the witnesses; and that the appellee knew that the work was being so carried on, and knew the purposes for which it was being conducted is evidenced by the solemn declaration of the appellee itself, made in a pleading filed by it in a court of justice.

The Trial Court must have received a wrong impression in regard to the facts bearing upon this point, or the finding insofar as it is above quoted, must have been due to some mistake. Such a finding, in any event, could be set aside by the appellate court but under the laws of Alaska there can be no doubt as to the Court's right to take this action.

Section 1204 as herein referred to, is set out

at length on page 24 of the opening brief, and it is therein provided with reference to findings of fact,

“and such findings of fact shall be subject to review by the appellate tribunal, and may be amended to conform to the evidence.”

While as will hereinafter be pointed out, this finding is, in any event, immaterial under the facts in the case, there can be no doubt of its erroneous character or of the Court's power to correct it.

This Court sustained the finding on the theory that the appellant having committed a wilful trespass on the Lotta claim, the posting of its notice and the work done by it, could not form the basis of a right.

Because of our failure to file a reply brief pointing out the facts in relation to this matter, the Court was led to adopt erroneous views of the evidence.

While the Oregon claim overlapped the Lotta claim, the evidence does not show that the appellant ever claimed any portion of the ground embraced within the Lotta.

True there was some dispute as to the location of the boundaries of the Lotta, but the Lotta claim was always conceded to be the property of the appellee. (See evidence Kinzie, record page 1554, also record page 256.) The Oregon claim as located, overlapped the Lotta, but this is a usual thing in a mining country. Locations are frequently made so as to overlap patented claims. Sometimes this is nec-

essary in order to make the end lines parallel but it more often occurs where the exact boundary of the patented claim is uncertain. In such cases, the location is so made, in order to avoid leaving a fraction between the claim located and the adjoining patented claim. So also in locating fractions, claims are usually run out full length.

It has already been pointed out in detail how the Mulligan notice happened to be posted on the Lotta claim and it is unnecessary to repeat what has been said in relation thereto.

The Court seems to have received the impression that a flume grade had been projected over a portion of the Lotta and Parrish No. 2 claims and that because of an action of ejectment which resulted in ejecting the appellant, the flume was afterward built on another grade. This is not the fact.

The Alaska Juneau dam was first built at the identical spot now occupied by it and the flume was originally constructed on the same grade that it now occupies. (See evidence Kinzie, record page 1521.)

Witness Kinzie, on the page above referred to, testified that on October 3d, the present Alaska Juneau dam was built below the brushed out line of the Lotta. This brushed out line was the southerly line of the Lotta as claimed by the appellee and as subsequently determined by the Court. The following is a portion of the testimony of this witness:

"Q. Was there ever any dam put in at any other place further up stream?"

"A. No, no dam at any other place except the position it was put in that day."

"Q. Where was the flume and headgate put with reference to the brushed out line of the Lotta?"

"A. That was below the brushed out line of the Lotta."

"Q. Did you ever put any flume or headgate above that place?"

"A. No; that was the only flume and headgate ever put in."

"Q. Where was the dam put in on October 3d with reference to the point where the dam now is?"

"A. At the same place."

"Q. Where was the intake or flume and headgate put in on the night of October 3d with reference to the place where the flume and headgate now are?"

"A. In exactly the same place."

"Q. Now, prior to the time that Judge Cushman's decision was rendered in the Basin case, what part of the dam extended over the line or on the Lotta claim?"

"A. On the left-hand side of the Creek there was an abutment or filling."

THE COURT: Right hand side of the creek going up or going down?"

"A. It would be the right hand side going down, the left hand side going up; there was a filling in front of the portion of the dam, and a portion of this filling was above the

lower side of the Lotta as determined by Judge Cushman."

"Q. The dam itself, the timber structure of the dam, where was that with reference to the lower side line of the Lotta prior to the decision?"

"A. The timber was always below the lower side line of the Lotta."

"Q. Now, after the decision by Judge Cushman what change, if any, was made in the dam?"

"A. The crib structure has been built on the left hand side of the creek going up, and this is constructed by cutting hitches into the rock on either side, and logs are held in place in these hitches by vertical logs placed on the lower side; the filling of the dam was then removed and then allowed to be carried down stream by the water, and filled in against the present left wing of the dam."

"Q. After you made that change, was there any of the dam on the Lotta claim?"

"A. No, no portion at all."

It is true that the Mulligan notice was posted on the Lotta but no work of any character was done on the Lotta claim. A tunnel was commenced in the latter part of August about ten feet above the present grade, but this tunnel was not on the Lotta claim. It was on ground covered by the Parrish No. 2 and Oregon claims.

On the 12th of September Surveyor Lindsay commenced work making the flume grade survey

and found that this tunnel was started too high up. He reported this fact to the superintendent and a few days later a new tunnel was commenced on the present grade.

All this was done long prior to the time that the judgment was rendered in the case referred to by the Court in its opinion between these same parties, adjudging the appellee to be the owner of the Lotta claim, defined by fixed boundaries delineated in the judgment and ejecting the appellant therefrom.

There was nothing for the judgment to operate upon, except the abutment to the dam referred to in the testimony of the witness above quoted. The Court seems to have gotten the impression that a flume grade was established and changed because of the judgment in that case. This is an error. When that judgment was rendered, the water had already been applied to use and the flume which was first built and was then in use is the same flume that is now being used.

THE TRIPP NOTICE

According to the facts, as they must be conceded to exist, appellant was the first to commence work looking toward the appropriation of the waters of Gold Creek and the first to apply these waters to a beneficial use; but it was urged that since the Tripp notice was posted, before appellant commenced work, the rights of the appellee

related back to the time of the posting of the Tripp notice and antedated for that reason the rights of the appellant.

No reply brief having been filed, pointing out the peculiar facts in this case, which prevented the application of the doctrine of relation back to the Tripp notice, the Court adopted the view of the appellee in this regard.

The reasons why the rights of the appellee cannot by relation date from the time of the posting of the Tripp notice will be separately considered.

I.

THE TRIPP NOTICE WAS NOT THE NOTICE OF APPELLEE

This proposition was discussed in the opening brief, where it was pointed out that Tripp was an employee of Underwood and the California-Nevada Copper Company and not of the Ebner Gold Mining Company. It was, however, urged that since the California-Nevada Copper Company was a stockholder in the Ebner Gold Mining Company, its employee, Tripp, was authorized to act for the Ebner Company in the matter of locating water rights, and the Court adopted the view that a large stockholder could, because of his ownership of stock, represent the corporation in this regard, citing *Moore vs. Abilene National Bank*, 159 Fed. 391, where it was held that the holder of the ma-

jority of stock of a corporation has the power, by electing biddable directors and by the vote of its stock, to do everything that the corporation can do, and that by reason of this he was the actual, if not the technical trustee for the minority holders of stock. That the majority stock holder of a corporation can, by voting his stock and electing biddable directors, control the action of the corporation cannot be disputed, and that he owes a duty to the minority stockholders because of this is equally true. But the mere ownership of stock does not make him the agent of the corporation. Each partner is the agent of the firm; in fact agency is the test by which it is determined whether an association of persons is, or is not a partnership. But a mere stockholder in a corporation, however large his holdings, cannot direct the business affairs of the corporation except by voting his stock at stockholders' meetings and electing directors who will do his bidding.

Again, the notice was signed by Tripp not as the agent or representative of some one else, but in his own name. It did not purport to be the act of the Ebner Company or the act of the California-Nevada Copper Company, or the act of Underwood. It purported to be upon its face nothing but the act of Tripp.

As between Tripp and his principal, if he were an agent this might not be important, but as between the principal and third parties, who are

not known to have had notice of the relation, quite a different matter presents itself.

Again, even though we assume that the California-Nevada Copper Company or Underwood, by virtue of ownership of stock in the Ebner Company, could act as the agent of that company, Tripp, who was at most the agent of Underwood or the Copper Company, could not and would not have the authority possessed by his employers in this regard, for it is a maxim of the law of agency that delegated authority cannot be delegated.

An agent of an agent is not the agent of the principal. If the California-Nevada Copper Company or Underwood were the agent of the Ebner Company, he or it might exercise the authority so possessed, but neither could delegate this authority to another.

II.

THE TRIPP NOTICE WAS POSTED ON THE PATENTED PROPERTY OF THE EBNER COMPANY SO THAT ITS CONTENTS COULD NOT BE ASCERTAINED BY ANY ONE WITHOUT BECOMING A TRESPASSER

As has been pointed out, the Tripp notice was posted on the Crown Point lode, the patented property of the Ebner Company, where one not connected with that company had no right to go.

In this connection it is contended that the mere posting of a notice in such a place that no

one can ascertain its contents without becoming a trespasser cannot serve as the basis for a right.

In this case the notice was not only posted on the private property of the Ebner Company but at a later date trespass notices were found on the property of this company warning others to keep off from it, and it is also shown that this company did not hesitate to resort to the use of dynamite and other violent methods in driving off persons whom they regarded as trespassers.

Furthermore, it is contended that appellee could acquire no right to the waters of Gold Creek because the Mulligan notice was by inadvertence posted on the Lotta claim. In other words, it is urged that the appellant should be condemned for inadvertently trespassing upon the Lotta. How then, can it be urged that the appellant shall also be condemned for not wilfully trespassing upon the Crown Point?

III

THE TRIPP NOTICE WAS TORN DOWN DURING THE LATTER PART OF JULY, 1910, AND WAS NOT REPOSTED. THE APPELLANT WITHOUT KNOWING THAT IT HAD EVER EXISTED, COMMENCED TAKING STEPS TOWARD THE APPROPRIATION OF THE WATERS OF GOLD CREEK ON AUGUST FIRST, 1910

Notice must be either actual or constructive.

The Trial Court found that the miners' rules which provided for constructive notice in certain cases had fallen into dispute and were no longer in effect. There was not then in force in the Territory any law providing for constructive notice on August 1, 1910.

Before there can be constructive notice, there must be a law providing how such notice shall be given and that law must be complied with.

During the latter part of July, 1910, the Tripp notice was torn down. On the first of August following appellant posted its notice and commenced work.

It had no knowledge whatsoever concerning the Tripp notice and it was impossible for it to procure such knowledge for the notice had been torn down and was no longer in existence. Not only was the notice torn down but it was not recorder until the following October, so that at that time the records disclosed nothing with reference to its existence. Surely the law would not impute to the plaintiff knowledge of information which it could not by any possibility acquire.

In the absence of miners' rules or statutes providing for constructive notice by recording water notices, such notices can for obvious reasons serve no purpose unless kept posted on the ground, at least as regards persons having no actual knowledge of their existence. This precise question was before the Supreme Court of California in the

case of Kimball vs. Gearhart, 12 Cal. page 32. The tenth instruction given to the jury in this case at the request of the defendants and which was approved by the Court, provides as follows:

“Even if the plaintiffs had located and claimed the waters in dispute, in the year 1854, and prior to the appropriation of the same by the defendants yet, if after making such location and claims, *plaintiffs failed and neglected to renew or keep in existence such notice*, or such other evidence of their location and claim, as would have put a reasonable and prudent man, wishing to appropriate the water, on inquiry, and in the absence of the notices or other evidences of said location or claim, the defendants located and appropriated said water in good faith for mining purposes, they must find for the defendants.”

The reason why the law requires a water notice to be kept posted or other evidence of location to be kept in existence in the absence of a recording statute is will illustrated by the facts in this case.

When the appellant went on the ground on August 1, 1910, to appropriate the water, the posted notice had been torn down so that there was no posted notice. Nor were there any other evidences on the ground indicating an intention of making a new appropriation of water. No work of any kind was being carried on. The mill buildings, flume, dam and everything else whatsoever about the Ebner mine were as they had been for years.

An investigation of the public records disclosed nothing for the notice had not been recorded. Nowhere was there the slightest evidence that the Ebner Company, Tripp, or any one else, intended to make a new appropriation of the waters of Gold Creek or make any use of these waters that would in any wise interfere with their appropriation by appellant.

The plans of the Ebner Company had been communicated to appellant by Mr. Ebner himself. Under these plans that company expected to use the water on the Lotta claim and this use of the water would not interfere with its appropriation by appellant.

Under these circumstances, appellant posted its notice and commenced work.

Not only did appellant at this time have no knowledge that the Tripp notice had ever existed but the knowledge of Tripp and the Ebner Company in this regard did not go much farther than the knowledge of appellant.

Tripp knew that he had posted the notice and this fact he communicated to the attorney for the Ebner Company, Judge Winn, but when Judge Winn asked him for a copy of the notice he was unable to supply it.

The posted notice had been torn down and the original which he should have had recorded was mislaid so that he could not find it. During all this time Tripp and his employer knew the plans

of appellant and as mining engineers they knew how vitally important it was that appellant should have the right to appropriate the waters of Gold Creek in connection with the consummation of these plans, yet appellant was not given the slightest intimation concerning the fact that the Tripp notice had ever existed.

On August 25th a suit was brought by the Ebner Company against the appellant. The Ebner Company laid claim to a mining claim called the "Parrish No. 2," and appellant claimed this same ground under a location called the "Oregon." Appellant was working on this ground and the Mulligan notice had been posted on the Lotta, an adjoining patented claim. The work being done by the appellant was in connection with the diversion and the appropriation of the water. Hence, suit was brought to enjoin the appellant from trespassing upon the Lotta and Parrish claims and from diverting the water of Gold Creek. Yet in this complaint which covers many pages, the Tripp notice was never mentioned. Not one word is said about it. The reason for this is obvious. While the Ebner Company may have known that a Tripp notice had been posted, it knew nothing about its contents for the notice which Tripp had mislaid had not yet been found.

Not only did this complaint make no mention of the Tripp notice, but the claim to the water was based first upon the right of the Ebner Company

as a riparian owner by reason of its ownership of the Parrish No. 2 claim, and secondly, upon the fact that the water had been "owned, possessed, appropriated and used by the Ebner Company and its predecessors in interest and applied to use in the operation, mining, opening up and development of said mining claims."

Not one word was said in regard to any plan under which the waters of Gold Creek were to be diverted and applied to use at Shady Bend or under which any new appropriation of the water was to be affected.

There was no reason why appellant should abandon its plans because of the first claim made, for aside from the fact that the doctrine of riparian rights has no application in Alaska, no assessment work had been done on the Parrish claim for many years. (See finding No. 6, record page 123) nor had the locators of the Parrish ever made a discovery. (See finding No. 5, record page 123.)

Nor, was there any reason why the fact that the Ebner Company had appropriated and used the water for many years should deter the appellant because such application and use did not in any wise interfere with the appropriation of the water by appellant, since it was used and turned back into the creek at a point above appellant's dam.

Appellant's work was accordingly pressed forward and appellant continued to spend its money

without any knowledge concerning the Tripp notice or any claim to the waters of Gold Creek on the part of the Ebner Company, that would interfere with their appropriation by it.

In October, Tripp returned from a trip to the westward. Thereupon he found in his safe in the C. W. Young & Company's building the notice that he had previously mislaid. This notice was on October 25th recorded and then for the first time appellant became aware of the fact that such a notice had ever existed.

(See evidence Kinzie, record page 1530.)

At this time appellant had not only located the water and commenced work, but had spent thousands of dollars in the prosecution of the work, having already carried the work forward to such an extent that on the 17th of November following the water was applied to use.

The contention made by appellee is simply this: that one who, in good faith and without knowledge of the fact that a water notice has even been posted by another, posts a notice and commences work looking toward the appropriation of water and presses such work forward with diligence, expending large sums of money in that connection, can be deprived of his water right by another upon a showing that such other had posted a notice which was not recorded and which was torn down so that it was not posted at the time he posted his notice and commenced work, making it impossible

for him to inform himself of the fact that such notice had ever existed; and the further showing that the original of the notice, a copy of which was posted and torn down, was mislaid, so that the person posting it was unable to supply a copy of it until months later when the original was found, and placed on record, at a time when the appropriator whose rights are subordinated to those of the poster of the notice had spent thousands of dollars without any knowledge or possible means of acquiring knowledge that such notice had ever been posted. The statement of this contention is sufficient to refute it.

Cleary, the Supreme Court of California announced the true rule in *Kimball vs. Gerhart*. Yet, if this contention is unsound, the decree in this case must be reversed for the contention states the exact facts as they exist in this case.

This point was not considered in rendering the decision, no reference being made to it in the opinion, showing that it was not called to the attention of the Court with sufficient clearness, due to a failure to file a reply brief. It is urged, therefore, that for this reason, if for none other, a rehearing be granted, in order that this matter, which so vitally affects the rights of appellant, may be fully presented to the court for their consideration.

This point is not only of vital importance to appellant, but is of equal importance to all others engaged in the mining business; for if one who ap-

propriates water in good faith cannot rely on the evidences of the public character of the water and of his right to appropriate it, as they exist at the time he initiates his right, the law relating to the right of appropriation loses its force and the right itself becomes valueless.

IV

THERE WAS NOTHING IN THE TRIPP NOTICE TO INDICATE ANY INTENTION TO CONVEY THE WATER TO SHADY BEND

The Trial Court found that it was a custom to post notices in connection with the appropriation of water. This is as far as the findings of the Trial Court went in this regard. Neither the findings of the Court nor the evidence shed any light upon the subject of what such notices must contain.

Clearly, every writing denominated a water notice could not be held sufficient as such, and since there is no finding upon the question of what kind of a notice the custom which the Court found to exist, required, there is no way of telling whether the Tripp notice complied with this custom.

In California prior to the adoption of definite statutes and rules upon the subject, such actions, indications and evidences of appropriation were required as the nature of the case and the

face of the country would admit of, and as were under the circumstances and at the time practicable.

Notice had to be given, or the doctrine of relation back could not be invoked, but

“the notice might be given by posting a written notice, blazing trees, or placing other unmistakable evidences upon the ground.”

Kimball vs. Gearhart, 12 Cal. 28.

This same doctrine was clearly announced by Judge Ross in the case of *Osgood vs. Water & Mining Co.*, 56 Cal. 571-580.

In that case a water appropriator had posted a notice which was more or less indefinite, but in addition to posting the notice he had clearly marked and defined upon the ground the line of his proposed ditch. This had been done by means of stakes and the blazing of trees. Some work also had been done upon the ditch along its course when the rights of a subsequent claimant attached.

It was held that under the circumstances sufficient notice had been given. Judge Ross, speaking for the Court, said:

“Leaving out of consideration the notice of 1860, by that of 1867, the plaintiff or any other inquirer would have seen that Kirk and Bishop claimed to be entitled to the waters of Echo Lake, for mining, manufacturing, agricultural, and other purposes, and that they intended to dam the stream, and take the water for the purposes mentioned,

in a flume, ditch, or canal, or by natural channels wherever found suitable. Looking further, he would have seen the proposed ditch staked and marked upon the ground, as finally completed, and through which the water was, infact, finally diverted."

Under these decisions notice might be given by posting a written notice or by blazing trees, or placing other evidences on the ground, or a notice might be posted supplemented by other evidences on the ground. In any event, however, the posted notice was construed in the light of the other evidences on the ground.

In Alaska it is a custom, under the Court's findings, to post a written notice, but since there is no finding upon the subject of what such notice must contain, any notice, which in connection with the evidences on the ground would indicate the appropriator's intention, would undoubtedly be held sufficient. So that after all, the law in Alaska and the law in California prior to the adoption of statutes and rules upon the subject are in all respects the same, except that in California written notice need not be given to evidence the appropriator's intention, while in Alaska a written notice must be given as one of the evidences of such intention. A written notice if posted would have the same effect in California that it would have in Alaska. In either jurisdiction an otherwise deficient notice would be aided

by the evidences on the ground and if indefinite it would be explained by the same evidences. In any event, the evidences on the ground form a part of the notice and it must be read in the light of these evidences in order to ascertain the intention of the appropriator.

The Tripp notice named no definite place of use other than the Ebner mine. The Ebner mine consisted of the underground workings, buildings, and other appliances used for mining purposes situated on the Ebner mining property.

On August 1, 1910, this property did not, at least as far as any one reading the Tripp notice could determine from available evidence, extend down stream beyond the southerly boundary of the Lotta claim, immediately below which appellant's dam and intake are situated. The underground workings were situated at the upper end of the group. Here also was situated a fifteen stamp mill which had been used for a number of years. At the lower end of the group a building had been constructed to house forty stamps and other mining machinery but no stamps or other machinery had been installed, except a compressor plant which had been placed in a room partitioned off for that purpose.

Mr. Ebner, the president of the Ebner Company, had told Mr. Bradley, the president of the appellant company, that it was his intention to open up the Ebner property on a larger scale, by

enlarging this building that had been constructed to house forty stamps so that it would house one hundred stamps, and then install therein one hundred stamps and supply the necessary power by diverting the waters of Gold Creek and conveying them to this mill.

A flume had been constructed from the Ebner dam to the fifteen stamp mill and the water had there been applied to use.

The Tripp notice was posted at the intake of this old flume, which was so situated that if enlarged and extended along the hill side until a point above the new mill on the Lotta was reached, it would serve as a portion of the flume by which water could be conveyed to, and applied to use, at the last mentioned point. There were no evidences on the ground to indicate an intention to convey the water to Shady Bend, or to make any new appropriation of water for use at any point except the site of the proposed new mill on the Lotta claim. No work of any kind was being done on the property.

The physical conditions at Shady Bend were such that the place was entirely unsuitable and unsafe as a site for a mill, so that no one would suspicion that any one would ever intend to build a mill there; nor had the appellees formed any intention of building a mill there on August 1, 1910.

Tripp had reported on three mill sites to his

employer, one of these was in the vicinity of Shady Bend, but his employer did not decide to build a mill at Shady Bend until the 6th day of August, and it must be that this decision was afterwards reconsidered for at the time of the trial the whole matter was still a matter of uncertainty.

Not knowing that an intention would ever be formed to build a mill at Shady Bend, Tripp could of course not make an appropriation of water for use at that point and was not in position to make any statement in his notice in regard to Shady Bend; but if Tripp could not do this, how could the appellant be charged with knowledge of the fact that any one would ever intend to build a mill at Shady Bend? Surely appellant could not have knowledge on August 1st of an intention that did not exist at that time, and the law would not presume that appellant had knowledge of that which was not known.

It may here be observed that the appellee never had any more than an intention to build a mill at Shady Bend. While some grading was done, no mill was ever built and in the light of the testimony of Mr. Bradley and Mr. Kinzie, in relation to the physical conditions at Shady Bend, it is safe to predict that no mill will ever be built there.

In the light of the evidence of Superintendent Kinzie that the grading done was all in loose

dirt and could serve no useful purpose in connection with the construction of a stamp mill it may well be doubted that any one ever intended to build a mill there. By working in loose dirt a large showing can be made for very little money. Such a showing is a valuable asset when it comes to raising money and the evidence leaves no doubt but what the Ebner Company, or more properly speaking, the California-Nevada Copper Company, was at this time quite as actively engaged in raising money as it was in building mills. When the stock of the Ebner Company was transferred to the Copper Company, it became subject to a two and one-half million dollar mortgage given by this company to secure its bonds. (See mortgage, record page 2010.) The load of debt thus thrust upon it was too heavy for the Ebner Company to bear. The bondholders seeing an opportunity of realizing something on their bonds, commenced foreclosure proceedings and the whole enterprise so auspiciously begun under a clear sky, collapsed under the weight of the juggernaut to which it was sacrificed, the Copper Company mortgage, and was reduced to a state of innocuous desuetude.

The Tripp notice, therefore, taken in connection with the evidences on the ground would indicate to a subsequent appropriator that it was the intention of Tripp, if he acted for the Ebner Company, to take out the water at the old Ebner dam, enlarge the old Ebner flume and extend it

until a point was reached above the mill building on the Lotta and make a new appropriation of water for use in connection with the operation of an enlarged mill to be there installed. It would indicate this and nothing else.

Especially is this true in the light of the fact that Tripp knew the plans of appellant and knowing these plans he would, if he had intended to interfere with them, have clearly indicated in some manner his intention so to do, and in the light of the further fact that the plans of the Ebner Company to build an enlarged mill on the Lotta above appellant's intake, had been communicated to it, so that it would be entitled to some notice of a change in these plans.

And here it may be observed that not only were these plans of the Ebner Company communicated to appellant, but they were a matter of general public knowledge. This is made evident by an inspection of the sketch map taken from a publication of the government; on this map is platted the fifteen stamp mill which is designated as the Ebner mill and also the new mill building on the Lotta which is designated the "new mill." (See record, page 1533 and map page 2152.)

The giving of a notice of an intended appropriation of water serves two purposes:

In the first place, it defines the right claimed and notifies others thereof so that the right so claimed will not be invaded.

In the second place, it limits the right claimed, giving others notice of its extent, so that such others may be able to appropriate the water below the intended place of use where it has been turned back into the stream—this in order that the best use possible may be made of the water, the aim not only of the miners and early settlers, but of all the rules, customs, regulations and statutes upon the subject.

Kinney vs. Smith, 21 Cal. 374.

The plaintiffs in this case built a dam in Clear Creek in the year 1853. They were the owners of a placer mining claim situated below the dam and between it and a ravine called "Slate Gulch." Slate Gulch was a gulch that emptied into Clear Creek. The plaintiffs built a ditch from their dam along the bank of the creek until Slate Gulch was reached. The ditch was so constructed that the waters could be diverted from the creek conducted through it to Slate Gulch and emptied into Slate Gulch, through which they would flow back into the creek.

The object of the diversion of the water was to enable the plaintiffs to work these placer mines in the bed of the creek. A notice was posted at the entrance setting forth this purpose. The principal purpose was to rid the bed of the creek of water, but it was shown that some of the water was also taken from the ditch and used in sluicing the ground.

The defendants built a dam a considerable distance above the plaintiffs' dam and diverted and appropriated the water for mining purposes. After this appropriation by the defendant the plaintiffs extended their ditch across Slate Gulch and to a point several miles below Slate Gulch where the water was applied for agricultural purposes.

A suit was brought to enjoin the defendants from diverting the water, on the ground that such diversion diminished the flow of water in the creek and that the portion which was returned to the stream was filled with mud and sediment, unfitting it for plaintiffs' use and causing by its deposits, injury to their ditches and reservoirs.

The defendants offered in evidence the notice posted by the plaintiffs with a view of limiting the plaintiffs' appropriation to an appropriation for the purposes and uses named in the notice, which were—

“With a view and purpose of constructing and building a dam across said creek at said point with a view of diverting and turning the water out of the bed of said stream below said dam to the extent of four claims.”

It was shown that no survey was made for a ditch below Slate Gulch at the time the notice was posted, nor for some time afterward, nor was notice given or trees blazed, or stakes set to mark such line.

The evidence showed that the plaintiffs had used the water for sluicing and other mining purposes in the bed of the creek between the dam and the Slate Gulch, but in the complaint it was not claimed that the diversion of the water by the defendants, injured the plaintiffs in connection with their use of the water at this point. The injury was claimed to go to the use of the water for irrigation purposes below Slate Gulch. The Court held that the notice posted, as well as all other facts proved, established

“that at most the water was appropriated for a special and limited purpose, to-wit: the working of the bed and banks of the creek below the dam to the extent of four claims, or at the farthest to the mouth of Slate Gulch,”

and that for that reason the action could not be maintained for damages for the causes set forth in the complaint which were, injury to the use of the water below Slate Gulch.

It was held that insofar as the object of the plaintiffs was to free the bed of the creek from water, there was no appropriation at all, and that insofar as the water was applied to use in sluicing and mining the claims lying between the dam and said Slate Gulch, the right was limited to a use at that particular point.

The Court say:

“No *express* distinction is made by the plain-

tiffs in their complaint or by the Court in its findings between the right of the plaintiffs to the use of so much water as might be necessary to work the bed of Clear Creek above Slate Gulch. But the plaintiffs allege that by their ditch they conducted the water on to mining grounds two miles below the dam, and the diagram shows the agricultural land to be still further below. It is for injury to the right to use the water at these localities that the complaint seeks redress. Slate Gulch is only one-half mile below the dam. In its findings the Court said: 'No survey was made for a ditch below Slate Gulch at that time (November, 1853) and for some time after, nor was any notice given, or tree blazed, or stakes set to mark such line.' "

The right of the plaintiffs was limited in this case by the terms of their notice, the Court having found that no surveys were run, stakes set or trees blazed, or any other evidences placed upon the ground of the ditch line below Slate Gulch.

The object of the appropriation as expressed in the notice in that case was in the first place to free the creek bed from water. To that extent, it was of course no appropriation at all, but beyond this the water also was applied for sluicing and other mining purposes. This of course constituted an appropriation, but the notice expressly stated that the object of the appropriation was the working of the four claims lying below the dam and there was no ditch line laid out below Slate Gulch

to indicate any other intention. Just as the Tripp notice in this case states that the water is to be applied at the Ebner mine, without marking upon the ground any ditch line to Shady Bend. In that case the Supreme Court of California held that the appropriation of the water for mining purposes was limited to mining carried on on these four claims, or at most, to mining carried on between the dam and Slate Gulch. In this case the appropriation of Tripp should be limited to an appropriation of the water at the mill site on the Lotta claim above appellant's dam and intake. (Petition, page 58.)

IN THE ABSENCE OF A STATUTE OR MINERS' RULE GOVERNING THE MATTER OF
RELATION BACK, AN APPROPRIATOR'S
RIGHT UPON APPLYING THE WATER
TO USE DATES FROM THE TIME HE
COMMENCED WORK AND NOT
FROM THE TIME HE POSTED
THE NOTICE

In most jurisdictions statutes have been passed, providing that if an appropriator posts and records a notice, and complies with all the other provisions of the statute, his right shall upon completion date back to the time the notice was posted. In these jurisdictions it is held that where an appropriation is made under a defective notice, or without a full compliance with some other provision of the stat-

ute, the doctrine of relation back has no application but the right of the appropriator dates from the time that the water was actually applied to use, and the appropriation fully completed.

Morris vs. Bean, 159 Fed. 651; (decided by this court);

Murray vs. Tingley, 30 Mont. 260; 50 Pac. 24;

Bailey vs. Tintinger, 122 Pac. 575;

Taylor vs. Abbott, 103 Cal. 421; 37 Pac. 408;

Wells vs. Mantes, 34 Pac. 324; 99 Cal. 583;

Denecochea vs. Curtis, 20 Pac. 563;

Nelson vs. Parker, 115 Pac. 489;

Crane Falls Power & Irrigation Co. vs. Snake River Irrigation Co. 103 Pac. 655;

In the absence of statute, miners' rules could of course be promulgated, providing for relation back to the time of posting such notice. Such rules, if in force would have the same effect as statutes and a failure to observe the provisions of the rules would be followed by the results that follow a failure to observe the provisions of the statutes.

Appellant plead the existence of a definite set of rules upon this subject and a failure to comply therewith on the part of the appellee. Many witnesses were called who testified in relation to the adoption of the rules, and their continual observance by the miners of the district. It was shown

that these rules were published in pamphlet form from time to time by attorneys practicing at Juneau; that the records kept by the recorder showed that they were uninterruptedly observed; that upon the trial of cases involving water rights they were relied upon as a basis for the decision, and that when this cause was up for a hearing on an application for a preliminary injunction, the appellees themselves invoked these rules in an attempt to sustain their position.

Appellees met this proof by calling the witness Ebner, who testified that in his opinion the rules had fallen into disuse. Upon cross examination, however, this witness testified to facts showing that he, himself, had always substantially complied with the rules in locating water rights. Appellee also called some other witnesses who testified that they knew nothing about the rules.

Upon this testimony the Trial Court found that the rules were never adopted, or if adopted, that they had fallen into disuse. There being some conflict in the testimony upon the subject, this Court did not feel that they should set the finding aside.

We think that in the light of the Alaska statute, relating to the right of this Court to review findings in equity cases, hereinbefore referred to, they would have the right to set the finding aside; but assuming that the Trial Court was right in holding that the rules had fallen into disuse, the

appellee would be in no better position than it would have been had the rules been in force. The rules provided for relation back to the time the notice was posted, if the prescribed conditions were complied with, but if the rules were not in force, then from whence comes the right to relate back to the time of posting the notice?

The Trial Court found that it was the custom to post a written notice, but the Court did not find that there was any custom under which the right of the appropriator would, under prescribed conditions, or at all, date back to the time of the posting of the notice; nor was there any evidence upon this subject. Even had the Court so found, this finding would have to be accompanied by a further finding that the conditions named had been complied with.

In the western states where the doctrine of appropriation arose, an appropriator of water was, prior to the adoption of statutes and rules upon the subject, required to give notice of his intended appropriation, if he desired to invoke the doctrine of relation back. But in these jurisdictions the giving of notice did not entitle him to relate back to the time the notice was given, but to the time he commenced work. In fact, the object of posting the notice was to apprise others of the purpose with which the work was carried on. The giving of notice and commencement of work were contemporaneous acts. The notice might be given by posting a printed or written notice at the point of

diversion, by blazing trees, driving stakes, or placing upon the ground any other unmistakable evidence of the appropriator's intention.

Kimball vs. Gearhart, 12 Cal. 29;

Osgood vs. Water & Mining Co. 56 Cal. 571;

By the custom in Alaska, under the Court's decision, an appropriator was required to post a notice. Under this decision a notice might be posted and supplemented by evidences upon the ground, but the evidences upon the ground were to be supplemented, if used at all, by a notice.

The effect of giving notice is so different in Alaska from what it is in California and other western states prior to the adoption of rules or statutes.

The common law doctrine of riparian rights was for obvious reasons, not suited to conditions existing in California and other western states, hence, the doctrine of appropriation arose at a very early time. There were then no laws under which titles to land could be acquired. The land as well as the water flowing thereon belonged to the general government and the rights exercised in relation thereto by the early settlers were mere possessory rights. The first occupier or possessor had the better right because possession was regarded as an evidence of title, and, since none except the government could produce any other evidence, the possessor had the only evidence

available, and was accordingly protected in his possession. This doctrine applied to the possession of land and water alike; it was the actual possession only that gave the right.

Kelly vs. Natoma Water Co. 6 Cal. 105; In deciding this case, it was said:

“Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows, such appropriation cannot be constructive because there would be no rule to limit or control it, resting as it must only on intention. The design of the defendants, two years before, to appropriate Alder Creek as a connecting link of their enterprises, could not give them exclusive rights until it was executed, *because it is not the intention to possess, but the actual possession which give the right.* And so, in the case of *Starks vs. Barnes*, 4 Cal. 412, cited by appellants, the doctrine of relation, as between the acts of the plaintiff, first and last, was simply applied ‘*to the thing possessed*’ and ‘*not to the intention of possessing.*’

A posted notice is no more than an evidence of the intention of the party to appropriate or take possession of the water. After the posting of a notice, the person posting it is no nearer the actual possession of the water than he was before he had posted it and the possession that is recognized by the Courts, as was stated in *Kelly vs. Natoma Wa-*

ter Company, must be actual and not constructive. While the notice evidences an intention to possess, it does not place the water under the control of the person posting it, and does not aid or assist him in that direction. Ditches, dams and other contrivances used in that connection have this effect, but notices do not. Accordingly, it was held in an early case in California, that since the possession of water could only be acquired by building ditches, dams and other like structures, a person commencing actual work on these structures was taking the necessary steps to reduce the water to possession, and further that if he carried on his work with diligence and actually reduce the water to possession, his possession would date from the time of taking the first steps to actually reduce the water to possession. That is to say, from the time he commenced work.

The custom naturally arose to post notices so as to inform others in regard to the nature and character of the work that was being carried on, and that it was for the purpose of reducing water to the possession of the party doing the work, and to otherwise define, limit and explain the character and extent of the possession that the person doing the work expected to have upon its completion. For all these purposes, the notice might be useful and in some cases necessary, but such notice had nothing to do with the work of reducing the water to possession. It was not a step in

that direction. At most, it was a mere declaration of an intention to take such steps. The statements in some cases, that upon completion, the right relates back to the taking of the first step, refers to the taking of the first step necessary to reduce the water to possession. That is to say, to the commencement of actual work.

This is the doctrine laid down in the case of *Conger vs. Weaver*, 6 Cal. 548; where it was held that the right to the possession of water after the same had been fully possessed, dated from the time that the first step was taken to reduce it to possession—the first thing necessary to be done in order to give an appropriator actual possession and control of the water.

One who has posted a notice merely has not taken a step in that direction; he has simply declared his intention to take such steps as may be necessary in that regard, and as was said in *Kelly vs. Natoma Water Company*, "it is not the intention to possess, but the actual -possession which gives the right," and again in the same case, "the doctrine of relation as between the acts of the plaintiff, first and last, was simply applied to the thing possessed and not to the intention of possessing."

The right, therefore, in the absence of miners' rules or statutes providing otherwise, dates from the commencement of the work, that being

that time when the first step is taken to reduce the water to possession.

Irwin vs. Straite, 4 Pac. 1215;

Union Milling-Mining Co. vs. Danberg,
81 Fed. 73;

Stieber et al vs. Frink et al, 2 Pac. 901;

Kimball vs. Gearhart, 12 Cal. 29;

Nevada County & Sacramento Canal Co.
vs. Kidd, 37 Cal. 282;

Sandpoint Water & Light Co., vs. Pan-
handle Development Co. 83 Pac. 347;

Nevada Ditch Co. vs. Bennett, 43 Pac.
472 and 482.

The appellant in this case posted its notice and commenced work on the same day, August 1, 1910. Appellee did not commence work until afterwards. Appellant worked continuously and applied the water to use on November 17, 1910, at the Snow Gulch compressor, and as soon as the flume and tunnels necessary for that purpose could be completed, also applied the water to use at its mill site on the shore of Gastineau Channel. Appellee commenced work some time after appellant had commenced work—worked spasmodically, and did not apply the water to use until appellant had not only applied it at the Snow Slide Gulch compressor, but also at its mill site on the shore of Gastineau Channel. Appellant therefore, was the first to commence work and the first to complete its appropriation by applying the water to the beneficial use designed.

It follows, therefore, that even though the Tripp notice had been posted at a point where the public had a right to go so that one could, without becoming a trespasser, become informed in regard to its contents; even though the notice had not been torn down in July but had been kept posted so that it could serve as a notice on August 1, 1910; even though on August 1st appellant had knowledge of the Tripp notice; even though the decision to build a mill at Shady Bend had not been delayed until August 6th but had been arrived at before the Tripp notice was posted; even though the Tripp notice instead of indicating a clear intention to apply the water at the new mill on the Lotta, had stated in express terms that it was the intention to convey the water to Shady Bend; even though the appellant had not been in complete ignorance of all these things, but had actual knowledge, the right of appellant would still be prior in time to that of appellee for appellant was the first to commence work.

AS TO THE CHARACTER OF THE WORK DONE BY APPELLANT

The first work done by appellant was of a preliminary character. While it did not consist of the actual construction of the dam or flume, it consisted of doing those things which conditions existing on the ground made necessary before the

actual construction of the dam and flume could be commenced.

There is no dispute in the evidence but what the character of the country in the vicinity of Snow Slide Gulch is such that the building of trails, steps, and other like conveniences to enable the men to reach the hillside and to convey material thence, as well as the construction of a bunk house in which to house the men, had to be done before actual construction work on the dam and flume could be commenced. And it was further shown and the fact was not contradicted, that this work was as necessary in connection with a flume grade, commencing at the Alaska Juneau dam as it would have been in connection with a flume grade commencing at the point where the Lotta notice was posted, or any other point in that vicinity, whether a trifle higher up or a trifle lower down.

Not only was the preliminary work carried on continuously, but as early as the month of August, and before the preliminary work was completed, and while it was still being carried on diligently, a tunnel was commenced, through which it was designed to construct a flume. This tunnel was on the ground claimed by the appellee under the Parrish location and the appellant under the Oregon location.

According to the testimony of Superintendent Kinzie, this tunnel was commenced some time

during the latter part of August. It is possible that its elevation was determined upon before it was learned that the Mulligan notice had been posted on the Lotta.

On August 28th after suit had been commenced against the appellant, a survey was made on the ground with a view of determining the lower side line of the Lotta. (See evidence Lindsay, record page 1454.)

This survey was made commencing at a well known point on the Idaho claim which in its patent description was tied to the Lotta and it was found by locating the Lotta in this manner the Mulligan notice would not be on the Lotta claim.

(See evidence, Lindsay, record page 1457, et seq.)

It was claimed, however, on the part of appellee that the location of the Lotta claim on the ground was determined by certain stakes which brought the southerly side line further down. A hearing was had upon an application for a temporary injunction, which brought out the contentions of the parties upon this subject some time prior to September 2d, that being the date of the Court's opinion denying the injunction. (See opinion, record page 2040.) Thereafter Surveyor Lindsey was directed to establish a flume grade and found that if a dam were placed in the creek at a sufficient elevation to carry the water through the tunnel that had been commenced, the

dam would be on the Lotta claim if it were conceded that the claim of appellees in regard to the location of the boundary were correct. Accordingly, to be sure that the tunnel would not be upon the Lotta, a new survey was made and a new tunnel started. The witness Lindsey on page 1452 testified as follows:

“Q. You established a grade for the flume grade about September 12th, you and Mr. Wayland?”

“A. About that, yes. That is the reason the dam was moved down and the flume was put in the present position. We wanted to be sure to be off the Lotta claim.”

“Q. And the dam was moved down in view of the survey you and Mr. Wayland made there on September 12th?”

“A. It was to be sure to be off the Lotta claim.”

The witness here speaks of moving the dam, whereas, what he meant to say was that the survey for the dam was moved, no dam having as yet been constructed.

Upon this point, he testified as follows, on page 1454:

“Q. Mr. Lindsey, you stated that you were given instructions to be sure and keep the dam off the Lotta—I think you made a statement in answer to Judge Winn’s question that was the occasion for moving the dam; was it for moving the dam or moving the survey of the dam?”

"A. If I made such a statement I didn't intend to; all that was done was making another survey."

"Q. The dam itself was never moved?"

"A. There was no dam in there at that time."

In further explaining the reason why the work on the upper tunnel was abandoned and a new tunnel started, the witness testified on page 1455 as follows:

"Q. What survey was this you made on September 12, 1910?"

"A. "I ran a level line from the upper water tunnel up the creek for the grade; when I found it was too high for the position of the dam. I reported it to Mr. Kinzie and he told me to make another survey and move it down; that is where the second tunnel was started, and the dam was put where it is now."

"Q. Don't you know that upper tunnel was started with the expectation of taking water off the Lotta claim?"

"A. I do not, no sir—the upper tunnel?"

"Q. You know if you had run that grade on the grade of the upper tunnel it would have taken the water of the Lotta claim approximately where the Mulligan notice is posted?"

"A. It would have taken it from there some place; that is why it was moved down."

The work on the upper tunnel was of course wasted. But it must be remembered that while all

of this was going on, Harri and those working with him, continued the work of building trails and other conveniences to enable the men to get around on the hillside and that this work was as necessary in connection with a flume on one grade as another.

In the case of Sandpoint Water & Light Co. vs. Panhandle Development Co. 83 Pac. 347, the work of building and constructing trails as preliminary to the actual work on the dam and flume, under conditions very similar to those pertaining to the case at bar, was held to be effectual and sufficient. And in the case of the Sumner Lumber & Shingle Co. vs. Pacific Coast Power Co. 131 Pac. 221, it was held that the right upon completion

“related back to the first substantial act of the appropriator for the acquisition of the right, whether that act be the actual commencement of construction work, or other necessary work incident thereto.”

It would seem clear even in the absence of authority upon the subject that whenever physical condition were such that actual work on the dam, flume or ditch could not be commenced until preliminary work of the character here done had been completed, the preliminary work would be as effectual for all purposes as work on the dam or flume itself. If it were otherwise, the rights flowing from the diligent prosecution of work would not inure to the appropriator as a result of his diligence and good

faith, but would attach only if the natural conditions were such that work on the dam or flume could be commenced at once. They would exist not because of the appropriator's diligence and good faith, but because of favorable natural conditions.

THE LEGAL EFFECT OF THE FACT THAT
APPELLANT'S NOTICE WAS POSTED
ON THE LOTTA CLAIM

As has already been pointed out, the posting of the Mulligan notice upon the Lotta claim was the result of a mistake; but even though it had been done intentionally that fact would not affect appellant's rights; even though a dam was installed on the Lotta and a ditch or flume had been constructed across it, the validity of appellant's water right would not be affected thereby.

It was so held by the Supreme Court of the United States in the case of *Boquillas Land & Cattle Co., vs. Curtis*, 213 U. S. 339; 29 Sup. Ct. Rep. 493. In that case a water right by appropriation was held to be valid as against the riparian owner, notwithstanding the fact that the water was taken from the land of the riparian owner, diverted by means of a dam situated on the riparian owner's land, and conveyed through ditches dug across the same, all of which had been done long after the riparian owner had acquired his patent. The suit was for an injunction to prevent the withdrawal of water from the San Pedro river and the build-

ing for that purpose of a dam and ditch upon and through the plaintiff's land.

The plaintiff owned a tract extending on both sides of the river for about fourteen and one-half miles and reaching back from the river for a mile and one-eighth on each side. It derived its title from a grant of the state on Sonora in 1833, and confirmed by a decree of the court of private land claims in 1899, and a patent of the United States in pursuance of the decree in 1900. Plaintiff had not appropriated the water, although the water would be required for the irrigation of its lands. The defendants threatened to and intended to build a new dam on plaintiff's land in place of the one originally constructed in 1903, but washed out, and to build and rebuild a ditch through the land of the plaintiff to another ditch already established and to divert the water through the same to lands of theirs on the north. They set up no title except that they had been the first to appropriate the water.

The statutes of Arizona provided for appropriation, and also for the right to construct ditches across the lands of others and provided that if parties whose lands were crossed were damaged, such parties might go before the probate court and have their damages assessed in a summary manner.

This statute is similar in effect to the ninth Section of the Act of 1866 in force in Alaska. (See *Jamison vs. Kirk* 98 U. S. 453.)

It was urged before the Supreme Court of the United States that the taking of land under this statute was the taking of property without due process. The Court held that this objection was merely technical, that while the dam and ditch were built on plaintiff's land, the water sought to be appropriated was the principal thing in dispute.

The defendant's right to the use of the water by appropriation was confirmed, notwithstanding the fact that his dam and ditches were built across the plaintiff's land and a decree of the State Court dismissing the plaintiff's bill was affirmed.

So also, in the case of *State vs. Superior Court*, 126 Pac. 945; it was urged that a water notice posted upon the lands of a railroad company to appropriate the waters of a lake lying in front of these lands, was such that it could confer no rights upon the party posting the notice, since a trespass resulted from going upon the lands of another to so post the notice.

The Court held that this contention was without merit, for the reason that the person posting the notice was not thereby seeking to acquire the ground upon which it was posted, but was seeking merely to acquire a water right.

The Court say:

"When the relator caused the appropriation notices to be posted, it was not thereby seeking to acquire the ground upon which they were

posted, but was seeking only to acquire a water right, which it had an equal right with the railroad company, Pettigrew and all others to acquire by appropriation."

The notice in this case, as in the case under discussion, is a notice appropriating the water. Under it no claim to the land itself is laid, and as already shown, no work whatever was ever done on the Lotta, but even if the ditches and flumes had been built across that claim, that would not affect appellant's water right under the authority of *Boquillas Land & Cattle Co. vs. Curtis*, 29 Sup. Crt. Rep. 493.

In the light of what has been said, therefore, it must be conceded that appellant's notice, although posted on the Lotta claim, was a full compliance with the custom requiring the posting of a notice and that the notice, more especially when taken in connection with the survey line previously placed upon the ground, gave explicit notice of appellant's intention; for, as under the facts in the case of *Osgood vs. Mining & Milling Co.*, any one going upon the ground would find the notice and from it would learn that appellant intended to appropriate twenty thousand inches of water for mining purposes; and looking further, he would find the survey line established on the ground on the 11th of July, and following this line he would be led to the site of the compressor at Snow Slide Gulch and appellant's millsite on the shore of the Gastineau

Channel, the places where the water was designed to be applied to use.

This fact coupled with the further fact that appellant commenced work on the same day that the notice was posted and prosecuted this work to completion with the highest degree of diligence, entitled the appellant to invoke the doctrine of relation back, and claim a water right as of August 1, 1910.

Appellant's right, however, under the facts in the case would be first in point of time, even though it were not entitled to invoke the doctrine of relation back. It applied the water to use on November 17, 1910; on that day it acquired a complete water right by appropriation. Appellee on the other hand, did not apply the water to use until some two years later. Even if it should be conceded that the Tripp notice was the notice of appellee, it is not disputed that that notice was posted at a point where it would be notice to no one except a trespasser; it is not disputed that the notice had been torn down and was not posted on August 1st, when appellant's rights attached and that appellant had no knowledge of the fact that it ever existed until several months later; nor was it stated in the notice that it was the intention to convey the water to Shady Bend. The Ebner mine was the only definite place named in the notice as a place of use and the indications on the ground all pointed to the fact that it was the intention to

use the water on the Lotta claim in accordance with the plans of the Ebner Company communicated to appellant.

The notice originally posted, therefore, was not a notice of an intention to convey the water to Shady Bend but of an intention to convey the water to the Lotta, so that an appropriation under it would not interfere with the application made by appellant; but from and after the time the notice was torn down the appellee had no posted notice to relate back to, for as has been shown, a notice to be effective must be kept posted at least as against a subsequent appropriator in good faith without knowledge. This being true, the rights of appellee would date not from the time Tripp posted the notice, nor yet from the time appellee commenced work, for it had at that time no notice posted as required by custom, but from the time that the water was applied to use, which was some two years after it had been applied by appellant.

It is not necessary, therefore, that the appellant in order to maintain its position, need invoke the doctrine of relation back—it was in any event first in time and hence first in right.

THE POINT THAT APPELLEE WAS IN NO
EVENT ENTITLED TO MORE THAN
THIRTY-TWO HUNDRED MINERS'
INCHES, THE CAPACITY OF ITS
FLUME, WAS DULY RAISED
AT THE TRIAL

Conclusion of Law No. 1 reads as follows:

“That as against the plaintiff, the defendant is the owner of, and entitled to the first use of ten thousand miners’ inches of water to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted.”

This conclusion was objected to and exception taken to it on the ground that it was not warranted by the facts as found by the Court and also on the other grounds as stated in the record. (See record page 2674.) Notwithstanding this objection, the conclusion was adopted by the court and a decree based thereon. This erroneous action of the Court was assigned as error. This, we think presented the point fully, without making a motion to amend the decree.

For the reasons stated appellant respectfully petitions this Honorable Court for a rehearing herein, in order that the matters herein referred to may be fully presented to the Court for consideration.

The fact that a reply brief was not filed com-

pelled us to trespass upon the time of the Court to a greater extent than would have otherwise been necessary. We ask the indulgence of the Court because of this fact, coupled with the further fact, that the matter in dispute is one of the highest importance to our client. According to the testimony of the witnesses, its new milling plant has approximately double the capacity of the Treadwell plant, heretofore considered as among the largest in the world. The fact that the fresh water supply for this plant is involved in this suit accounts for our solicitude and has led us to burden the Court with many details that would ordinarily not be referred to in a petition for a rehearing.

J. A. HELLENTHAL.
CURTIS H. LINDLEY.
HELLENTHAL & HELLENTHAL.
Attorneys for Appellant.

The understigned, J. A. Hellenthal, hereby, CERTIFIES that he is one of the attorneys for appellant, and that in his judgment the above and foregoing petition for rehearing is well founded and that it is not interposed for delay.

J. A. HELLENTHAL,
Attorney for Appellant.

IN THE
United States Circuit Court of Appeals 5
For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY

(a corporation),

Appellant,

VS.

EBNER GOLD MINING COMPANY (a corpora-

tion), THE ALASKA-EBNER GOLD MINES

COMPANY (a corporation), ANGUS MACKAY,

as receiver for THE ALASKA-EBNER GOLD

MINES COMPANY (a corporation), and

DOWNIE D. MUIR,

Appellees.

No. 2795

REPLY OF APPELLEE, EBNER GOLD MINING COMPANY,
TO APPELLANT'S PETITION FOR A REHEARING.

JOHN R. WINN,

ALFRED SUTRO,

Attorneys for Appellee,

Ebner Gold Mining Company.

WINN & BURTON,

PILLSBURY, MADISON & SUTRO,

A. D. PLAW,

Of Counsel.

Filed

APR 11 1917

Filed this.....*day of April, 1917.*

F. D. Monckton,
Clerk.

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY
(a corporation),

Appellant,

vs.

EBNER GOLD MINING COMPANY (a corporation), THE ALASKA-EBNER GOLD MINES COMPANY (a corporation), ANGUS MACKAY, as receiver for THE ALASKA-EBNER GOLD MINES COMPANY (a corporation), and DOWNIE D. MUIR,

Appellees.

No. 2795

**REPLY OF APPELLEE, EBNER GOLD MINING COMPANY,
TO APPELLANT'S PETITION FOR A REHEARING.**

In its opening brief appellant urged that certain findings, upon which the decree of the trial court rests, are unsupported by the evidence; and it pointed out wherein, it conceived, the evidence is insufficient. Appellee, Ebner Gold Mining Company, in its brief, discussed this evidence, at considerable length, and showed that it is entirely ample to support these findings. Full oral argument was had before the Court. Upon this argument and the briefs and, as appears from the opin-

ion filed, from a careful examination of the evidence in the record, this Court determined that the findings, upon which the decree is based, are well supported by the evidence and that the record is otherwise free from error.

Appellant's "Petition for Rehearing" is devoted mainly to an argument upon the sufficiency of the evidence to support the same findings as were attacked by it in its opening brief and at the oral argument. But this Court, after a careful review of the whole case, has determined and declared that the evidence is sufficient to support the findings; especially, in view of the fact that the burden of proof was upon the appellant, which instituted the suit.

The petition of appellant for a rehearing is, in effect, an attempt to convince this Court that there was evidence in conflict with that, which this Court holds is sufficient to support the findings. But, plainly, inasmuch as this Court has determined that there was evidence sufficient to support the findings, the fact, that there may be other evidence which does not sustain them, cannot afford any reason for the further consideration of the case, in view of the settled rule, adverted to in the opinion, that whenever a finding is based upon conflicting evidence, this Court is not "at liberty to disregard it if we were of the opinion that it was contrary to the weight of evidence".

Under these circumstances, we deem it unnecessary to make any answer to the argument in appellant's petition upon the weight of the evidence, further than to refer to the views of the evidence contained in this

Court's opinion, and to the discussion thereof in the brief of appellee.

Besides its argument on the evidence, appellant advances certain propositions which, it claims, furnish reasons why appellee is not entitled to prevail. We will briefly consider these propositions.

I.

THE TRIPP NOTICE WAS THE NOTICE OF APPELLEE.

As stated in the opinion, a majority stockholder is the actual trustee for the corporation; and, applying this principle, this Court holds that anything that Tripp, the agent for the majority stockholders, did for the benefit of the properties, owned by the corporation, inured to the benefit of the corporation.

This ruling is challenged by appellant by an assertion that a majority stockholder cannot direct the business affairs of a corporation and that, assuming that a majority stockholder is the agent of the corporation, that agent has no power to delegate his authority.

This suggestion of appellant is based upon a failure to distinguish between trusteeship and agency. True, a majority stockholder is not the agent of the corporation with power to direct its affairs; but, this does not prevent the majority stockholder from bearing a fiduciary relation to the corporation, in consequence of which anything done by him, for the benefit of the corporate property, is conclusively presumed to have been

done for the benefit of the corporation; whether it is done by the majority stockholder himself or by his agent.

II.

ALTHOUGH THE TRIPP NOTICE WAS POSTED ON THE EBNER PROPERTY, NO ONE GOING UPON THE PROPERTY FOR THE PURPOSE OF READING THE NOTICE WOULD BE A TRESPASSER.

The suggestion of appellant, that because the Tripp notice was posted on the Ebner property, it could furnish no basis for a right to the water, for the reason that anyone going upon the property to read the notice would be a trespasser, merits, we think, no serious consideration; for, of course, when a notice of appropriation is posted on one's own land it is, in effect, an implied invitation to anyone to come upon that land for the purpose of reading the notice; and, anyone so going upon the land to read such a notice is clearly not committing a trespass.

III.

IRRESPECTIVE OF THE TRIPP NOTICE, APPELLEE, HAVING FIRST COMMENCED THE WORK, IS ENTITLED TO PRIORITY.

Much is said in the petition with reference to the effect of the Tripp notice as giving notice to appellant; and appellant argues that, irrespective of the notice, the rights of the parties are to be governed, solely, by the priority of the work done in aid of the appropria-

tions. The validity of the Tripp notice and its effect in giving appellee priority are fully discussed in our brief herein; but, aside from this, under appellant's own view, appellee is entitled to priority because, as the trial court found and as this Court held, in accordance with the evidence,

“not until after the appellee had followed up the posting of the Tripp notice by actual physical work at the point where the notice was posted, and after the actual diversion of water at that point, did the appellant do anything that would give notice to the appellee that the appellant intended to make any claim to the water of the creek, or appropriate the same”.

IV.

THE POSTING OF APPELLANT'S NOTICE ON APPELLEE'S PROPERTY AND THE WORK DONE THEREON WERE TRESPASSES AND NO RIGHTS COULD BE INITIATED THEREUNDER.

In its opinion this Court refers to, and applies, the settled doctrine

“that the right of appropriation extends only to waters upon the public domain of the United States, or upon the public lands of a state, for one cannot acquire a water right on land held in private ownership by another without acquiring an easement in such land.”

and cites several cases sustaining this doctrine.

As being inconsistent with this doctrine, appellant cites *Boquillas Land and Cattle Co. v. Curtis*, 213 U. S. 339, and *State v. Superior Court*, 126 Pac. 945. Neither

of the cases cited militates in the slightest against the principle applied by this Court.

In the *Boquillas* case, was involved the application of a statute of Arizona, which provided that

“All the inhabitants of this Territory who own or possess arable and irrigable lands, shall have the right to construct public or private acequias, and obtain the necessary water for the same *from any convenient river, creek or stream of running water.*”

The court held that, under this statute, the water could be appropriated “*from any convenient river, creek or stream of running water*”, although such running water was situated on land of another; damages being allowed by the statute for injury done to such other’s land.

In *State v. Superior Court*, the court concluded that a certain special statute

“confers upon landowners nothing more than an equal right of appropriation with others, regardless of their land bordering upon the shore line”;

and that, therefore, water could be appropriated upon the land of another.

There is no similar statute applicable to Alaska. The statement of appellant, that the statute involved in the *Boquillas* case is similar in effect to the ninth section of the Act of 1866, in force in Alaska, is based upon a misconception of the terms of the provision of the Alaska statute. That statute provides, solely, that rights to the use of water, which have vested and accrued, shall be maintained; and that rights of way for

the construction of ditches and canals shall be confirmed; with the proviso that, any person who shall, after the passage of the act, in constructing any ditch or canal, injure or damage the possession of any settler on the public domain, shall be liable to damages therefor. This section thus wholly fails to grant any right to appropriate water on lands of another; it simply deals with the rights of one, who has effected an appropriation, to construct ditches for carrying the water.

It is respectfully submitted that the decision of this Court, as expressed in its opinion, is plainly right; that appellant, in its petition for rehearing has shown no particular wherein the Court's opinion is erroneous, or any reason why the case should receive further consideration, and that the petition should, therefore, be denied.

Dated, San Francisco,
April 11, 1917.

JOHN R. WINN,
ALFRED SUTRO,
Attorneys for Appellee,
Ebner Gold Mining Company.

WINN & BURTON,
PILLSBURY, MADISON & SUTRO,
A. D. PLAW,
Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD WHITE, Commissioner of Immigration
at the Port of San Francisco,

Appellant,

vs.

WONG QUEN LUCK,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

JUN 10 1900

J. G. MURPHY

CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD WHITE, Commissioner of Immigration
at the Port of San Francisco,
Appellant,

vs.

WONG QUEN LUCK,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States, for the
Northern District of California, First Division.*

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas
Corpus.

Names and Addresses of Attorneys of Record.

For the Respondent: THE UNITED STATES AT-
TORNEY.

For the Petitioner: JOSEPH P. FALLON, Esq.,
San Francisco, Calif.

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

No. 15,895.

In the Matter of the Application of WONG HONG
for a Writ of Habeas Corpus for and on Be-
half of WONG QUEN LUCK.

Praeceptum for Transcript of Record.

To the Clerk of Said Court:

Sir: Please make copies of following papers to
be used in preparing transcript on appeal in the
above-entitled cause:

1. Petition for Writ of Habeas Corpus consisting
of the first five pages thereof, thus omitting
Exhibit "A."
2. Order to Show Cause.
3. Marshal's Return of Service of Order to Show
Cause.
4. Demurrer to Petition.

5. Stipulation of Attorneys that Immigration Record and Exhibits be Filed and Considered Part of Petition.
6. Order Overruling Demurrer, and Ordering Writ to Issue.
7. Writ of Habeas Corpus and Marshal's Return Thereto.
8. Return to Petition and Stipulation Set Forth on Last Page of Said Return.
9. Minutes of Hearing Before District Court, Nov. 12, 1915.
10. Order of Discharge.
11. Petition for Appeal.
12. Assignment of Errors.
13. Order Allowing Appeal.
14. Notice of Appeal. [1*]
15. Stipulation and Order That Respondent's Exhibits "A" and "B" may be Transferred on Appeal in Their Original Form.
16. Stipulation as to Hearing on Return to Petition on Nov. 12, 1915.

JOHN W. PRESTON,
C. G. H.

United States Attorney.

Dated this 19th day of May, 1916.

[Endorsed]: Filed May 19, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Record.

*In the District Court of the United States, in and for
the Northern District of California.*

In the Matter of the Application of WONG HONG,
for a Writ of Habeas Corpus for and on Be-
half of WONG QUEN LUCK.

Petition for a Writ of Habeas Corpus.

To the Honorable MAURICE T. DOOLING, Judge
of the Above-entitled Court.

Petition of Wong Hong respectfully shows:

I.

That your petitioner is a resident of the City and
County of San Francisco, State of California; that
this petition is made for and on behalf of Wong
Quen Luck by said petitioner for the reason that the
father of said Wong Quen Luck is at present out of
the City and County of San Francisco; and for the
further reason that Wong Quen Luck is in custody
and cannot make the application for and on behalf
of himself.

II.

That Wong Shoon Jung is the father of Wong
Quen Luck; that said Wong Shoon Jung was born
in the United States and is a citizen thereof, and a
resident of Riverside, Riverside County, California.

III.

That said Wong Quen Luck, the detained person
on whose behalf this petition is made, is the minor
son of Wong Shoon Jung, and is a citizen of the
United States.

IV.

That the said Wong Quen Luck is unlawfully imprisoned, detained, confined and restrained of his liberty by Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, at the Immigration [3] Station at Angel Island or in some other place in the Northern District of California and is about to be deported from the United States to China.

V.

That the illegality of such imprisonment, restraint, detention and confinement consists of this, to wit:

That the said Wong Quen Luck made application to be admitted to the United States as a citizen thereof and as the minor son of Wong Shoon Jung. That subsequent to said application to be so admitted to the United States, the said Wong Quen Luck was by the Secretary of Labor of the United States, refused and denied a fair hearing in good faith, and was by the Secretary of Labor by a manifest abuse of the discretion committed to him by law and against the spirit and letter of the law, denied the right to enter the United States, and in this respect petitioner alleges:

That the said Wong Quen Luck, during the month of June, 1915, arrived at the Port of San Francisco from China and made application to the Commissioner of Immigration at the Port of San Francisco for admission to the United States as a citizen thereof, and as a minor son of Wong Shoon Jung.

That thereafter said application for admission was

denied by said Commissioner, that thereafter, upon application made on behalf of said detained person, Wong Quen Luck, the said Commissioner, granted and permitted new and further testimony to be submitted by said detained person in support of said application for his admission to the United States; that thereafter said detained person Wong Quen Luck, did submit new and further testimony to said Commissioner in support of his application for admission to the United States; that thereafter as your petitioner is informed and believes and therefore alleges the fact to be, the inspector [4] who took said testimony under the direction of said Commissioner strongly recommended that said Wong Quen Luck be admitted to the United States and that he be permitted to reside therein and that said application for admission be granted and said petitioner alleges upon information and belief that said recommendations were so made for the reason that the said testimony so submitted clearly established the right of said detained person to enter the United States and reside therein.

That your petitioner is informed and believes and therefore alleges the fact to be that the Secretary of Labor thereafter without reason refused, neglected and failed to consider said testimony so submitted and said recommendation so made, and immediately thereafter denied said Wong Quen Luck the right to enter the United States and ordered the said Commissioner at the Port of San Francisco to deport the said Wong Quen Luck to China.

That your petitioner is informed and believes and

therefor alleges the fact to be that said Secretary of Labor did without reason consider other matters which were never incorporated in any record had or produced at the Port of San Francisco, the exact character and nature of which matter is now unknown to your petitioner and to Wong Quen Luck, and that at no time did the said Wong Quen Luck have an opportunity to rebut, deny, explain or overcome said matter.

VI.

A copy of the testimony taken in said matter before the Inspector of Immigration is attached hereto, made a part hereof and marked Exhibit "A."

VII.

That the said Wong Quen Luck, said detained person, has exhausted all the rights and remedies and has no further remedy before the Department of Labor, and that unless the writ of habeas [5] corpus issue out of this court as prayed for herein directed to the said Samuel W. Backus, Commissioner as aforesaid, in whose custody the body of the said Wong Quen Luck now is, the said Wong Quen Luck will be forthwith deported from the United States to China without due process of law.

WHEREFORE, your petitioner prays that the writ of habeas corpus be issued by this Honorable Court directed to and commanding the said Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, to have and produce the body of the said Wong Quen Luck before this Honorable Court at its courtroom in the City and County of San

Francisco, in the Northern District of California, at the opening of court on a day certain, in order that the alleged cause of imprisonment, detention, confinement and restraint of the said Wong Quen Luck and the legality or illegality thereof may be inquired into and in order that, in case the said imprisonment, detention, confinement and restraint are unlawful and illegal, that the said Wong Quen Luck be discharged from all custody, detention, imprisonment, confinement and restraint.

Dated this 28th day of September, 1915.

JOSEPH P. FALLON,
Attorney for Petitioner. [6]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Wong Hong, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

WONG HONG (Chinese Characters).

Subscribed and sworn to before me, this 28th day of September, 1915.

[Seal] R. B. TREAT,
Notary Public in and for the City and County of San
Francisco, State of California. [7]

(Here follows Exhibit "A.")

[Endorsed]: Filed Sep. 28, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [8]

*In the District Court of the United States, in and for
the Northern District of California.*

In the Matter of WONG QUEN LUCK, on Habeas
Corpus.

Order to Show Cause.

Upon reading and filing the verified petition of Wong Hong praying for the issuance of the writ of habeas corpus, and good cause appearing therefor:

IT IS HEREBY ORDERED that Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco, at Angel Island, be and appear before the above-entitled Court, Department Number One thereof, on Saturday the 2d day of October, 1915, to show cause, if any he have, why a writ of habeas corpus should not issue in this matter and the petition granted as prayed, and this at the hour of 10 o'clock of said day, and

IT IS FURTHER ORDERED that said Wong Quen Luck be not removed from the jurisdiction of this Court until the further order of this Court, and

IT IS FURTHER ORDERED that a copy of this order be served upon said Samuel W. Backus or such other persons having said Wong Quen Luck in custody as an *office* of said Samuel W. Backus.

Dated Sept. 28, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Sep. 28, 1915. W. B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk. [9]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas
Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled matter and for grounds of demurrer alleges:

I.

That said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus or any relief thereon.

II.

That said petition is insufficient in that the statements in the petition relative to the record of the testimony taken on the trial of the applicant, are statements of conclusions of law.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney,

Attorneys for Respondent.

Service of the within by copy admitted this —— day of ——, 191—.

JOSEPH P. FALLON,
Attorney for Petitioner.

[Endorsed]: Filed Oct. 1, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [10]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,895.

In the Matter of WONG QUEN LUCK on Habeas
Corpus.

**Stipulation (That Immigration Record and Exhibits
be Filed and Considered Part of Petition).**

It is hereby stipulated and agreed by and between J. P. Fallon, of counsel for applicant, in the above-entitled matter, and Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, in the State and Northern District of California, and John W. Preston, United States Attorney in and for the said district, that the record and exhibits of Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, Cal., in the matter of the application of said Wong Quen Luck for admission into the United States be filed and considered a part of the petition for a writ of habeas corpus in said matter.

Dated Oct. 8, 1915.

JNO. W. PRESTON,
United States Attorney,
Attorney for Respondent.

JOSEPH P. FALLON.
Attorney for Petitioner.

[Endorsed]: Filed Oct. 9, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [11]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas
Corpus.

**Order Overruling Demurrer, and Ordering Writ to
Issue, etc.**

JOHN W. PRESTON, Esq., United States At-
torney, and CASPAR A. ORNBAUN, Esq.,
Assistant United States Attorney, Attor-
neys for the Respondent.

JOSEPH P. FALLON, Esq., Attorney for
Petitioner.

The demurrer to the petition for a writ of habeas
corpus herein is overruled, and said writ will issue
returnable November 6th, 1915, at 10 o'clock A. M.

October 25th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 25, 1915. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [12]

*In the District Court of the United States, in and
for the Northern District of California; First
Division.*

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas
Corpus.

Writ of Habeas Corpus.

The President of the United States of America, to
the Commissioner of Immigration, Port of San
Francisco, Calif., Angel Island, California,
Greeting:

YOU ARE HEREBY COMMANDED that you
have the body of the said person by you imprisoned
and detained, as it is said together with the time and
cause of such imprisonment and detention, by what-
soever name the said person shall be called or
charged, before the Honorable M. T. Dooling, Judge
of the District Court of the United States, for the
Northern District of California, at the courtroom of
said court, in the City and County of San Francisco,
California, on the 6th day of November, A. D. 1915,
at 10 o'clock A. M. to do and receive what shall then
and there be considered in the premises.

AND HAVE YOU THEN AND THERE THIS
WRIT.

WITNESS, the Honorable M. T. DOOLING,
Judge of the said District Court, and the seal thereof

at San Francisco, in said District, on the 1st day of November, A. D. 1915.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [13]

Return on Service of Writ.

United States of America,
N. District of California,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the Commissioner of Immigration by handing to and leaving a true and correct copy thereof with Edward White who is the Commissioner of Immigration at the Port of San Francisco, personally at San Francisco in said District on the 4th day of November, A. D. 1915.

J. B. HOLOHAN,
U. S. Marshal.

[Endorsed]: Filed Nov. 4, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [14]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,895.

In the Matter of the Application of WONG HONG
for a Writ of Habeas Corpus for and on Be-
half of WONG QUEN LUCK.

Return (to Writ of Habeas Corpus).

Now comes Edward White, Commissioner of Im-

migration at the Port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the writ of habeas corpus heretofore granted by said Court, admits, denies and alleges as follows:

Admits that petitioner is a resident of the City and County of San Francisco, State of California and that petition is made for and on behalf of Wong Quen Luck.

Denies that Wong Shoon Jung is the father of Wong Quen Luck.

Denies that Wong Quen Luck is the son of Wong Shoon Jung and further denies that Wong Quen Luck is a citizen of the United States.

Denies that the said Wong Quen Luck is unlawfully imprisoned, detained, confined and restrained or is unlawfully imprisoned or detained or confined or restrained of his liberty by Samuel W. Backus, or by anyone else at the Port of San Francisco at the Immigration Station at Angel Island or in some other place in the Northern District of California or at any other place or at all and in this connection respondent alleges that the said Wong Quen Luck is lawfully and rightfully held by the said immigration officers at Angel Island, California, and is about to be deported from the United States. [15]

Admits that Wong Quen Luck made application to be admitted to the United States as a citizen thereof and as the minor son of Wong Shoon Jung.

Denies that subsequent to said application the said Wong Quen Luck was refused and denied or refused or denied a fair hearing in good faith and denies that the said Secretary of Labor by abuse of discre-

tion denied the right to enter the United States.

Admits that the said Wong Quen Luck during the month of June, 1915, arrived at the port of San Francisco from China and made application to the Commissioner of Immigration at said port for admission to the United States as a citizen and as the minor son of Wong Shoon Jung.

Admits that thereafter said application for admission was denied by said Commissioner.

Denies that thereafter upon application of the said Wong Quen Luck or otherwise, the said Commissioner granted and permitted or granted or permitted new and further testimony to be submitted by the said detained person.

Denies that the said Wong Quen Luck submitted new and further testimony to said Commissioner in support of his application for admission to the United States and in this particular respondent alleges that the examination of said detained person was never reopened for the hearing of additional testimony but was a continuous examination and investigation until all of the evidence concerning said detained person was fairly introduced.

Denies that *any* any subsequent hearing of testimony taken in behalf of applicant or at any other time or at all the said Commissioner recommended that the said Wong Quen Luck be admitted to the United States; denies that the said Commissioner recommended that the said Wong Quen Luck be permitted to reside [16] in the United States and further denies that the said Commissioner recommended that the said application for admission be

granted to said applicant, and in this connection respondent alleges that after hearing all of the evidence introduced with reference to the application of said applicant to enter the United States, the said immigration authorities recommended that the application of said applicant be denied, said recommendation being based upon the finding that the relationship claimed to his alleged father was not established to the satisfaction of the said immigration authorities.

Denies that the Secretary of Labor without reason refused, neglected and failed or refused or neglected or failed to consider the testimony and all of the testimony submitted on behalf of the applicant and denies that the said Secretary of Labor considered other matters in rendering his decision in this case other than the evidence submitted in behalf of said applicant, and denies that said applicant had no opportunity to rebut, deny and explain or rebut or deny or explain all of the evidence submitted in said case and in this connection respondent alleges that said applicant was presented with and had the opportunity to answer and rebut any and all evidence introduced either for or against said applicant.

As a further separate and distinct answer and defense to the petition on file herein and to the writ of habeas corpus heretofore granted by said court, respondent alleges that since the application of said applicant Wong Quen Luck was made to enter the United States through the Port of San Francisco, certain testimony and other evidence was taken concerning his said entry by the immigration authori-

ties acting for and on behalf of the Government of the United States, and in this connection respondent files with this answer all of the evidence, testimony, views of the [17] immigration was taken and marked exhibit "A," attaches to and incorporates into and makes a part of this answer the said testimony, evidence and other proceedings which compose the record known as the official record of the Department of Labor and duly certified as such; that said record contains all of the testimony, evidence and other proceedings that were before the said Secretary of Labor of the United States and which were considered by him at the time that the said warrant of deportation was issued.

WHEREFORE, respondent prays that the said petition for writ of habeas corpus and the said writ of habeas corpus be denied and dismissed and that said applicant be remanded to the custody of the respondent for deportation as provided for in the said warrant of arrest heretofore issued by the Secretary of Labor of the United States and for such other and further relief as to this court seems equitable and just.

JNO. W. PRESTON,
United States Attorney.
CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Respondent.

**Stipulation Re Official Record of Department of
Labor, etc.**

It is hereby stipulated and agreed by and between the United States Attorney and the applicant,

through his attorney Joseph P. Fallon, that the evidence, testimony and proceedings referred to in the within answer and which compose the record known as the official record of the Department of Labor and duly certified as such, may and the same is hereby incorporated into and made a part of this answer without being actually attached thereto.

JNO. W. PRESTON,

U. S. Attorney,

CASPER A. ORNBAUN,

Asst. U. S. Attorney,

Attorneys for Respondent.

JOSEPH P. FALLON,

Attorney for Petitioner. [18]

United States of America,

Northern District of California,

City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service at the Port of San Francisco, and has been specially directed to appear for and represent the respondent Edward White, Commissioner of Immigration, in the within-entitled matter; that he is familiar with all the facts set forth in the within return to the writ of habeas corpus and knows the contents thereof; that it is impossible for the said Edward White to appear in person or to give his attention to said matter; that of affiant's own knowledge the matters set forth in the return to the writ of habeas corpus are true, excepting those matters which are stated on

information and belief, and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 8 day of November, 1915.

[Seal]

C. W. CALBREATH,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Nov. 8, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [19]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 12th day of November, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas Corpus.

Order Discharging Wong Quen Luck from Custody.

This matter came on regularly this day for hearing of the writ of habeas corpus heretofore issued herein. The detained was present in court in custody and with his attorney J. P. Fallon, Esq., and C. A. Ornbaun, Esq., Assistant United States Attorney, was present on behalf of respondent, and presented part of the original Immigration Records

as to detained herein. Thereupon, the Court ordered that said Records be filed and marked Respondent's Exhibit "B," and that the same be considered as a part of the original petition herein. Mr. Fallon then called the detained Wong Quen Luck, who was duly sworn and examined in his own behalf, through Chinese Interpreter D. D. Jones, Esq. After hearing Mr. Ornbaun and Mr. Fallon, the Court ordered said matter submitted, and after due deliberation had thereon, ordered that the detained herein Wong Quen Luck be, and he is hereby, discharged from further custody and that he go hence without day. Thereupon Mr. Ornbaun, on behalf of respondent, duly entered an exception to said order. [20]

*In the District Court of the United States, Northern
District of California.*

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas
Corpus.

Order of Discharge.

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been had thereon, it is by the Court now here ordered, that the said named person in whose behalf the writ of habeas corpus herein was sued out, is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby discharged from the custody from which he

has been produced, and that he go hence without day.

Entered this 12th day of November, 1915.

[Seal]

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

[Endorsed]: Filed Nov. 12, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

No. 15,895.

In the Matter of the Application of WONG HONG
for a Writ of Habeas Corpus for and on be-
half of WONG QUEN LUCK.

Petition for Appeal.

To the Honorable M. T. DOOLING, Judge of the
District Court of the United States, for the
Northern District of California:

Edward White, as Commissioner of Immigration,
at the Port of San Francisco, appellant herein, feel-
ing aggrieved by the order and judgment made and
entered in the above-entitled cause, on the 12th day
of November, A. D. 1915, discharging Wong Quen
Luck from the custody of said appellant, does
hereby appeal from said order and judgment to the
United States Circuit Court of Appeals for the
Ninth Circuit, for the reasons set forth in the as-
signment of errors filed herewith.

WHEREFORE, petitioner prays that his appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents, and all of the papers upon which said order and judgment were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court and in accordance with the law in such case made and provided.

Dated this 10th day of May, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney.

Service of the within by copy admitted this — day of —, 19—.

JOSEPH P. FALLON,

Attorney for Appellee.

[Endorsed]: Filed May 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,895.

In the Matter of the Application of WONG HONG
for a Writ of Habeas Corpus for and on behalf of WONG QUEN LUCK.

Assignment of Errors.

Now comes Edward White, Commissioner of Immigration at the Port of San Francisco, respondent

in the above-entitled case, and appellant in the appeal to the United States Circuit Court of Appeals taken herein, by his attorneys John W. Preston, United States Attorney, and Casper A. Ornbaun, Assistant United States Attorney, and files the following assignment of errors upon which he will rely in the prosecution of his appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit from an order and judgment made by this Honorable Court on the 12th day of November, A. D. 1915:

I.

That the Court erred in granting the writ of habeas corpus and discharging the alien, Wong Quen Luck, from the custody of Edward White, the said Commissioner of Immigration.

II.

That the Court erred in holding that it had jurisdiction to issue a writ of habeas corpus in the above-entitled cause, as prayed for in the said petition for a writ of habeas corpus.

III.

That the Court erred in holding that the allegations contained in said petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the Court erred in finding that the evidence upon which [23] the Secretary of Labor issued the warrant of deportation for the said Wong Quen Luck was insufficient to justify deportation of the said Wong Quen Luck.

V.

That the Court erred in holding that the evidence as presented in the said petition for a writ of habeas corpus and the return thereto, together with all of the exhibits on file in the above-entitled cause, was insufficient to justify deportation and in permitting the said Wong Quen Luck to appear before this Court and give testimony in which the said Wong Quen Luck endeavored to explain the discrepancies which appeared in the testimony given by him and his alleged father upon the hearing had before the immigration officers at Angel Island, upon the application of the said Wong Quen Luck to enter the United States.

VI.

That the Court erred in discharging the said Wong Quen Luck from the custody of the said Edward White, Commissioner of Immigration, after hearing the testimony of the said Wong Quen Luck, as given before the said Court on November 12, 1915.

WHEREFORE, the said Edward White, appellant herein, prays that the said order and judgment of the United States District Court, in and for the Northern District of California made herein, in the office of the clerk of the said court, on the 12th day of November, A. D. 1915, setting aside the return to the petition for writ of habeas corpus, and discharging the said Wong Quen Luck from the custody of Edward White, Commissioner of Immigration, be reversed, and that the said Wong Quen Luck be *re-mained* to the custody of the said Commissioner of Immigration.

Dated this 10th day of May, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney. [24]

Service of the within by copy admitted this —
day of —, 19—.

JOSEPH P. FALLON,

Attorney for Appellee.

[Endorsed]: Filed May 11, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [25]

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

No. 15,895.

In the Matter of the Application of WONG HONG
for a Writ of Habeas Corpus for and on be-
half of WONG QUEN LUCK.

Order Allowing Appeal.

On motion of John W. Preston, United States Attorney, and Casper A. Ornbaun, Assistant United States Attorney, attorneys for Edward White, Commissioner of Immigration at the Port of San Francisco, and petitioner in the above-entitled cause, it is hereby ordered that an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from an order and judgment heretofore made and entered herein, discharging the said Wong Quen Luck from the custody of the said Edward White, Commissioner of Immigration, at the Port of San

Francisco, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in the manner and time prescribed by law.

Dated this 11th day of May A. D. 1916.

M. T. DOOLING,

Judge of the District Court.

Service of the within by copy admitted this — day of —, 19—.

JOSEPH P. FALLON,

Attorney for Appellee.

[Endorsed]: Filed May 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [26]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,895.

In the Matter of the Application of WONG HONG
for a Writ of Habeas Corpus for and on behalf of WONG QUEN LUCK.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to Wong Quen Luck, and to Joseph P. Fallon, His Attorney.

You and each of you will please take notice that Edward White, Commissioner of Immigration, at the Port of San Francisco, appellant herein, hereby appeals to the United States Circuit Court of Ap-

peals for the Ninth Circuit, from an order and judgment made and entered herein on the 12th day of November, A. D. 1915, setting aside the return to the petition for a writ of habeas corpus and discharging the said Wong Quen Luck from the custody of the said Edward White, Commissioner of Immigration at the Port of San Francisco, and appellant herein.

Dated this 10th day of May, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney.

Service of the within by copy admitted this — day of —, 19—.

JOSEPH P. FALLON,

Attorney for Appellee.

[Endorsed]: Filed May 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [27]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,895.

In the Matter of the Application of WONG HONG
for a Writ of Habeas Corpus for and on behalf of WONG QUEN LUCK.

**Stipulation Re Respondent's Exhibits "A"
and "B."**

It is hereby stipulated and agreed by and between the respective parties in the above-entitled cause,

that the original record of the Bureau of Immigration, which was filed in the above-entitled Court, as Respondent's Exhibits "A" and "B," and which were made a part of respondent's return to the petition for writ of habeas corpus in said cause, may be transferred in their original form and without being transcribed, to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is and may there be considered a part of respondent's return to the said petition for writ of habeas corpus, and the record, in determining this cause on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit, without objection on the part of either of said respective parties.

Dated this 10th day of May, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney.

JOSEPH P. FALLON,

Attorney for Wong Quen Luck. [28]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,895.

In the Matter of the Application of WONG HONG
for a Writ of Habeas Corpus for and on behalf of WONG QUEN LUCK.

**Order Directing Transmission of Original Exhibits
to Appellate Court.**

It appearing to the Court that it is both necessary and proper that the original papers and records referred to in the above-entitled stipulation should be inspected in the United States Circuit Court of Appeals, for the Ninth Circuit, in determining the appeal of said cause, the same having been made and considered a part of the respondent's return to the petition for writ of habeas corpus,—

IT IS HEREBY ORDERED that the said original record be transferred by the clerk of said court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be retained by said clerk until the appeal in the said above-entitled cause is properly disposed of, at which time the original papers and records are to be returned to the clerk of the above-entitled court.

M. T. DOOLING,

Judge of the District Court.

Dated this 13 day of May, A. D. 1916.

[Endorsed]: Filed May 13, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [29]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

No. 15,895.

In the Matter of the Application of WONG HONG
for a Writ of Habeas Corpus for and on be-
half of WONG QUEN LUCK.

**Stipulation (As to Certain Discrepancies in the
Testimony).**

The Court having determined that the hearing before the immigration officers upon the application of Wong Quen Luck to enter the United States was unfair, proceeded to hear and determine such application and

IT IS HEREBY STIPULATED AND AGREED, by and between the respective parties in the above-entitled cause, that the facts appearing before said Court on the 12th day of November, A. D. 1915, at which the said Court permitted the said Wong Quen Luck, on hearing on the return to writ of habeas corpus, to take the stand and explain certain discrepancies in his testimony and the testimony of his alleged father, are as follows:

The detained, Wong Quen Luck, contended that the discrepancies which appeared in his testimony and the testimony of his father at the hearing had before the immigration officials, and upon which he was not permitted to enter the United States, was due to the fact that the official interpreter, who acted for the immigration officials at the time that the testimony of the said applicant was taken, spoke a different dialect from that spoken by the said detained, and because of the fact that the said official interpreter spoke a dialect which was not understood by the detained, the hearing granted him upon his application to enter the United States was unfair.

[30]

Upon the foregoing statement, the Honorable M. T. Dooling, Judge of the above-entitled court, permitted said detained to take the stand, and the answers of the said detained to the various questions propounded to him by his counsel and the United States Attorney's office, through the official Chinese Court Interpreter, namely: D. D. Jones, explained the discrepancies satisfactorily to the Court, and the said detained was ordered released.

Dated this 17th day of May, A. D. 1916.

JNO. W. PRESTON,
United States Attorney.

CASPER A. ORNBAUN,
Asst. United States Attorney.

JOSEPH P. FALLON,
Attorney for Wong Quen Luck.

[Endorsed]: Filed May 18, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [31]

*In the District Court of the United States, for the
Northern District of California, First Division.*

**Certificate of Clerk U. S. District Court, as to
Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 31 pages, numbered from 1 to 31, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the matter of Wong Quen Luck, on Habeas Corpus, No. 15,895, as the same now remain on file and of record in the office of the clerk of

said court; said transcript having been prepared pursuant to and in accordance with the "Praeceptum" (copy of which is embodied in this transcript), and the instructions of the attorney for respondent and appellant herein.

I further certify that the costs for preparing and certifying the foregoing Transcript on Appeal is the sum of Thirteen Dollars and Eighty Cents (\$13.80).

Annexed hereto is the Original Citation on Appeal issued herein, page 33.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of June, A. D. 1916.

[Seal]

WALTER B. MALING,

Clerk.

By T. L. Baldwin,

Deputy Clerk.

CMT. [32]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Wong Quen Luck, and Joseph P. Fallon, His Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern

District of California wherein Edward White, Commissioner of Immigration at the Port of San Francisco, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 11th day of May, A. D. 1916.

M. T. DOOLING,

United States District Judge. [33]

United States of America,—ss.

On this 12th day of May, in the year of our Lord one thousand nine hundred and sixteen, personally appeared before me, Joseph E. Connolly, the subscriber, and makes oath that he delivered a true copy of the within citation to Joseph Fallon, the attorney for the appellee, on the 11th day of May, 1916.

JOSEPH E. CONNOLLY.

Subscribed and sworn to before me at San Francisco, this 11th day of May, A. D. 1916.

[Seal]

C. W. CALBREATH.

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: No. 15,895. United States District Court for the Northern District of California, Edward White, Appellant, vs. Wong Quen Luck. Citation on Appeal. Filed May 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 2810. United States Circuit Court of Appeals for the Ninth Circuit. Edward White, Commissioner of Immigration at the Port of San Francisco, Appellant, vs. Wong Quen Luck, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed June 9, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, Commissioner of Im-
migration at the Port of San Fran-
cisco, *Appellant,*

VS.

WONG QUEN LUCK,

Appellee.

GOVERNMENT'S BRIEF

Upon Appeal from the United States District Court for the
Northern District of California, First Division.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellant.

Filed this.....day of February, 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2810

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EDWARD WHITE, Commissioner of Im- migration at the Port of San Fran- cisco,	<i>Appellant,</i>
vs.	
WONG QUEN LUCK,	<i>Appellee.</i>

GOVERNMENT'S BRIEF

Statement of Facts

The appellee, Wong Quen Luck, claims to be the son of Wong Shoon Jung, who is a citizen of the United States. Appellee is sixteen years of age, came to the United States from China on the Steamship "Korea," June 21, 1915, and made an application to enter the United States as a son of a citizen. After a careful hearing of said application, the Secretary of Labor held that the "relationship claimed" was not established and deportation was ordered.

Specification of Errors

I.

That the Court erred in granting the writ of habeas corpus and discharging the alien, Wong Quen Luck, from the custody of Edward White, the said Commissioner of Immigration.

II.

That the Court erred in holding that it had jurisdiction to issue a writ of habeas corpus in the above entitled cause, as prayed for in the said petition.

III.

That the Court erred in holding that the allegations contained in said petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of the writ of habeas corpus.

IV.

That the Court erred in finding that the evidence upon which the Secretary of Labor issued the warrant of deportation for the said Wong Quen Luck was insufficient to justify deportation of the said Wong Quen Luck.

V.

That the Court erred in holding that the evidence as presented in said petition for a writ of habeas corpus and the return thereto, together with all of the exhibits on file in the above entitled cause, was

insufficient to justify deportation and in permitting said Wong Quen Luck to appear before the Court and give testimony in which the said Wong Quen Luck endeavored to explain the discrepancies which appeared in the testimony given by him and his alleged father upon the hearing had before the Immigration officers at Angel Island.

* * * *

Although there are several specifications of errors, they all relate to practically the same question, and in fact, there seems to be one material question to be determined in this case, and that is whether the Court erred in holding that the facts presented in the Government's return (which included all of the evidence upon which the order of deportation was based) justified the said Court in finding that the conclusions, orders made, and proceedings had, were manifestly unfair, or that the action taken by the Immigration officers was such as to prevent a fair investigation, or that there was a manifest abuse of discretion on the part of said Immigration officials.

It was necessary for the lower Court to find that there was unfairness or an abuse of discretion on the part of the Immigration officials before it permitted said appellee to attack the proceedings of the Immigration officials.

Low Wah Suey vs. Backus, 225 U. S. 460.

In this case Justice Day said:

“A series of decisions in this Court has settled that such hearings before executive officers may

be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of discretion committed to them by the statute. In other cases, the order of the executive officers within the authority of the statute is final.

U. S. vs. Ju Toy, 198 U. S. 253, 49 L. Ed. 1040, 25 Sup. Ct. Rep. 644;

Chin Yow vs. U. S., 208 U. S. 8, 52 L. Ed. 369, 28 Sup. Ct. Rep. 201;

Tang Tun vs. Edsell, 223 U. S. 673."

The burden of proof lies upon appellee to show that he was denied a fair opportunity to produce the evidence that he desired to produce or that a fair hearing was denied him by the Immigration officials before the lower Court has jurisdiction.

Chin Low vs. U. S., 208 U. S. 8.

In this case Justice Holmes said:

"Of course if the writ is granted, the first issue to be tried is the truth of the allegations last mentioned (referring to the allegations set forth in the petition for a writ of habeas corpus). If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair, though summary hearing, the case can proceed no further. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case,

whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But supposing that it could be shown to the satisfaction of the district judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner the hearing that he has been denied."

From this case it can readily be seen that the lower Court would have no jurisdiction over this case unless it can first be shown that the appellee was not given a fair hearing.

This case did not differ from the ordinary case, and the hearings were conducted in a fair and impartial manner. In fact, an exhaustive examination was made by the Immigration officials to ascertain whether the relationship of father and son existed. Appellee's petition (p. 5 Trans.) shows that "the said Commissioner granted and permitted new and further testimony to be submitted by said detained in support of said application for his admission to the United States."

There is an allegation on page 5 of the transcript as follows:

"That, thereafter, as your petitioner is informed and believes, and therefore alleges the fact to be, the inspector who took said testi-

mony under the direction of said Commissioner, strongly recommended that the said Wong Quen Luck be admitted to the United States, and that he be permitted to reside therein, and that the said application for admission be granted, and said petitioner alleges upon information and belief that the said recommendations were so made for the reason that the said testimony so submitted clearly established the right of said detained person to enter the United States and reside therein."

Had counsel been properly informed concerning the facts of this case, he certainly would not have made such an allegation, for there was no such report in the record.

The only reports made show material discrepancies and contain no such recommendation referred to by said petitioner. The reports are as follows:

On pages 19 and 20 of the record of the Bureau of Immigration, which is an exhibit in this case, Immigrant Inspector Harry B. Blee made the following report:

100/164 "Office of Immigrant Inspector
Port of San Bernardino, Cal.,
July 2, 1915.

Inspector in Charge,
Immigration Service,
Los Angeles, Cal.

Inclosed herewith find record of investigation, in quintuplicate, in the case of Wong Quen Luck, alleged son of Wong Shoon Jung, an alleged native. Wong Quen Luck arrived on S. S. Korea, June 21, 1915, at San Francisco, the San Francisco file being 14438/6-20, your

file 5551/96. Copy of habeas corpus proceedings in the case of the alleged father Wong Shoon Jung, is transmitted for use in the case, said copy bearing the No. 7580. Same should be returned when it has served its purpose. The attention of the San Francisco office should be invited to the fact that the alleged father in this case and the identifying witness Wong Ben Jew both gave testimony, which has a bearing on this case, in the case of Wong Ho Lung ex S. S. Siberia, Nov. 9, 1914, who holds certificate of identity No. 17645. San Francisco file No. 13905/19-12 covers the admission of Wong Ho Lung. I hunted up Wong Ho Lung and took a statement from him regarding the present applicant, though he was not mentioned as a witness in the case.

A number of discrepancies have developed in testimony, perhaps the most noticeable being with regard to the applicant's paternal grandfather whom he states he has never seen. Testimony of both the father and witness Wong Ben Jew is to the effect that the grandfather in question lived in the same house with applicant for years. Applicant states that his father owns no land in China. The father states that he does. Applicant states that Wong Daw Sai who lives in the home village has no boys. Both the father and the identifying witness testify that Wong Daw Sai has a son. Witness Wong Ben Jew says that he has visited applicant's home in China many times; that during the last trip he made to the home village in China he went to Wong Quen Luck's house, which was just across the street from his own. 'Many, many times. I cannot count how many times.' A few other minor discrepancies are also noted.

(Signed) Harry B. Blee,
Immigrant Inspector."

There was a second and supplemental report made after further testimony was taken, which will be found on page 22 of said Immigration record, and which reads as follows:

“SUPPLEMENTAL REPORT.

Office of the Commissioner,
14438/6-20 San Francisco, Cal, July 15, 1915.

Commissioner of Immigration,
Thro' Chinese Insp. in Charge,
Angel Island, Cal.

In re Wong Quen Luck, Son of Native, Riverside, Cal., ex S. S. Korea, June 21, 1915:

Statement of the applicant was taken, and the case was forwarded to Riverside for further investigation; it is now returned to me for final report.

The case contains numerous material discrepancies:

Alleged father states that his father died ST-3-10 in his house in China, and that his father and mother had been living in his house ever since he was married. Applicant states that his paternal grandfather died CR-1; does not know where; that he never saw him, and that his mother told him about his grandfather's death.

Applicant states that the witness, Wong Bing Jew, came to his house and delivered some money in 1909, but he doesn't know how much. The witness states that he never at any time took any money to applicant's house, but that he had visited applicant's house many times. The applicant, however, contradicts the latter statement, saying that the witness only called at his house once. Alleged father states that he never sent any money home by the witness.

Applicant states that his father owns no land in China, while his alleged father states that he owns about two acres of rice land, in three pieces, and that his wife leases this land to other people.

There are other minor discrepancies in the testimony, but the foregoing, in my opinion, are sufficient to warrant denial of the applicant, and I so recommend.

(Signed) W. D. Heitmann,
WDH/PAM. Immigrant Inspector."

After the said investigation was made and the reports rendered, the Inspector of the law section prepared a memorandum, which is set forth on page 28 of said Immigration record for the use of the Commissioner of Immigration, and which is as follows:

No. 14438/6-20 "Office of the Commissioner
San Francisco, Cal, August 5, 1915.
Memorandum for the Commissioner.

In re Wong Quen Luck alleged son of merchant, ex S. S. 'Korea,' June 21, 1915.

The American nativity of the alleged father is satisfactorily established, he having been admitted as such at three different times, the second time from the essential trip, ex S. S. 'Gaelic,' May 20, 1899, and the last time No. 102, ex S. S. 'Korea,' October 9, 1909.

The examining inspector reports adversely in this case because of certain discrepancies contained in the testimony. One of said discrepancies, to my mind, is in itself sufficient to warrant denial. It will be noted that applicant remembers his father having been in China some eight or nine years ago, but does not remember

the exact date. The fact that alleged father actually was in China in 1909, and now states that his father died in ST-3 (1911), he having received a letter to that effect from his wife, and further states that his father and mother always lived in the same house ever since he married his wife, clearly shows that he is not the father of the present applicant, who testifies that he never saw his paternal grandfather and does not know where he died, but was told by his mother that he, the paternal grandfather, died in CR-1 (1912). He only changed his statement as to whom he received that information from, after having first stated that his father told him about his paternal grandfather's death and having had his attention called to the fact that he had stated his father had not been in China during the last eight or nine years.

The remaining discrepancies are also more or less serious and also tend to show more clearly that a fraudulent claim has been advanced in this case. As applicant has failed to satisfactorily establish the relationship claimed to his alleged father, denial is recommended in this case.

(Signed) Lauritz Lorenzen,
Inspector, Law Section."

LL/LM

Following the said investigation and reports, all of the evidence, reports and proceedings in the case were incorporated into the said Immigration record on file herein and forwarded to the Bureau of Immigration at Washington, D. C., and there a memorandum was prepared for the Secretary of Labor, as follows:

“September 2, 1915.

In re appeal of Wong Quen Luck, alleged son of a native.

Memorandum for the Assistant Secretary:

This is the case of a Chinese boy of 16 who seeks admission to his alleged father, a ‘court record’ native. He has been denied because the following material discrepancies appear in his testimony and that of his alleged father and the witness:

1. The alleged father states (pp. 17-18) that his father lived with his (the alleged father’s) family in China from the time of the latter’s marriage until the former died in 1911, only four years ago; also that the paternal grandmother lived with him until her death in 1906. Applicant, however, testifies (p. 6) that he never saw his paternal grandfather, who died in 1912; that his mother told him of his grandfather’s death; and that his paternal grandmother died ‘over ten years ago in our house in China.’ This discrepancy is regarded as particularly serious.

2. Applicant states (p. 6) that the alleged father was last in China ‘eight or nine years ago, I (he) don’t remember the date.’ As a matter of fact, the alleged father last returned from China in 1909, only six years ago, when applicant would have been 10 years of age. He

should remember the visit of the alleged father distinctly under these circumstances.

3. Applicant testifies (p. 5) that alleged father owns no land in China, whereas the alleged father states (pp. 15-16) that he owns two acres in three pieces and that it is rented out by his wife.

4. Applicant states that one of his next-door neighbors has two girls and no boys (p. 5). The alleged father testified (p. 16) that his neighbor has 'two or three girls' and two sons, and the witness states (p. 13) that his neighbor has two or three girls and one son.

There are other discrepancies, some of a similar nature and others of less importance. The principals and witnesses, of course, agree on many points, but the Bureau is of the opinion that the failure to agree on the material matters referred to above arouse so grave a doubt as to the *bona fides* of the case as to justify no action other than exclusion. It is accordingly recommended that the decision of Commissioner Backus be affirmed and deportation directed.

For the Commissioner-General,
A. Warner Parker,
Law Officer."

After a careful consideration of the said memorandum and record, the order of deportation was affirmed by Assistant Secretary Louis F. Post in the following language:

"DEPARTMENT OF LABOR.

54005/52

Sept. 14, 1915.

In re Wong Quen Luck.

The conflict between applicant and his father as to applicant's grandfather appears upon the

record too clearly to be accounted for by misapprehension or mistranslation or in any other way than as evidence that the applicant was not a member of his alleged father's household, and therefore (considering the other facts) not his alleged father's son. According to applicant he was a member of the household but had never seen his grandfather, although, according to the alleged father (p. 17) the grandfather had lived in the same house with applicant from the time of the father's marriage until the grandfather's death, when applicant was 10 or 12 years old. Appeal dismissed.

(Signed) Louis F. Post,
Asst. Secy."

There was not a scratch of testimony in the record that would indicate unfairness or an abuse of discretion on the part of the Immigration officials and in the absence of such a showing, their findings and conclusions are final and conclusive.

Tang Tun vs. Edsell, 223 U. S. 673;

Low Wah Suey vs. Backus, 225 U. S. 460;

U. S. vs. Ju Toy, 198 U. S. 253;

Chin Yow vs. U. S., 208 U. S. 8;

Zakonaite vs. Wolf, 226 U. S. 272;

Healy vs. Backus, 221 Fed. 358-364.

In this case the said certified record of the Bureau of Immigration was filed and made a part of the petition for the writ of habeas corpus upon the hearing of the demurrer. This record was later incorporated into and made a part of the Govern-

ment's return, so the lower Court had all of the proceedings before it, and the Government contends that these proceedings failed to show unfairness or an abuse of discretion on the part of the Immigration officials.

It is true that appellee *contends* that the discrepancies set out in said Immigration record and upon which the order of deportation was based were "due to the fact that the official interpreter who acted for the Immigration officials at the time that the testimony of said applicant was taken spoke a different dialect from that spoken by said detained," but in answer to this contention the Government calls attention to the fact that no such objection was ever made on the part of appellee during the hearings before the Immigration officials, although said appellee had C. L. Bouve, one of the most learned and eminent Immigration lawyers in the United States, employed. Furthermore, the examination of said appellee, as set out on page 6 of the said Immigration record, shows conclusively that the appellee spoke the See Yip dialect, which was the original dialect of said interpreter.

If the Court were permitted to go beyond the Immigration record and to allow the alien to explain discrepancies, such procedure would result in a serious handicap to the Immigration officials and block our courts with litigation, for the Government cannot conceive of a case where it would not be possible for the alien to give some plausible excuse

for the discrepancies which appeared in the record after such alien had been permitted to see the record and learn what discrepancies appeared therein.

That the courts are not prepared to inquire into the sufficiency of probative facts or consider the reasons for the conclusions reached by the Immigration officials is well settled.

Lee Lung vs. Patterson, 186 U. S. 170;

Healy vs. Backus, 221 Fed. 358, 365;

White vs. Gregory, 213 Fed. 768.

In conclusion the Government takes the position that the record in this case shows that there was ample evidence to justify the order of deportation and that the Court erred in going beyond the record presented by the Immigration officials and permitting the appellee to explain discrepancies which the latter claims were due to the interpreter speaking a different dialect, when, as a matter of fact, the record does not support any such contention.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellant.

No. 2810

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, Commissioner of Immigration
at the Port of San Francisco,

Appellant,

VS.

WONG QUEN LUCK,

Appellee.

Filed

BRIEF FOR APPELLEE.

MAR 5 - 1917

F. D. Monckton
Clerk

JOSEPH P. FALLON,
Attorney for Appellee.

Filed this.....day of March, 1917.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

No. 2810

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, Commissioner of Immigration at the Port of San Francisco,	} <i>Appellant,</i>
vs.	
WONG QUEN LUCK,	} <i>Appellee.</i>

BRIEF FOR APPELLEE.

As stated in appellant's brief the appellee, Wong Quen Luck, was born in China, and is the son of a native born citizen of the United States. He made application to be admitted to the United States in the month of June, 1915, in order to join his father, who is a resident of the State of Texas, and was denied the right to land by the Secretary of Labor.

The ground for said denial was based upon certain alleged discrepancies appearing in the testimony offered by the father and the appellee at a hearing held at Angel Island, California, before the immigration officials.

A petition for a writ of habeas corpus was filed in the United States District Court for the Northern District of California, and after a full hearing, the Court ordered his discharge.

The Commissioner of Immigration has appealed from this order on the grounds that the hearing was full and fair before the Department of Labor, and that he nor any other official of the Department of Labor had committed any abuse of discretion or exercised any unfair or arbitrary action in the matter.

In the petition for the writ of habeas corpus, certain allegations are made based upon information and belief to which counsel for appellant, on page "five" of his brief, calls attention, as follows:

"There is an allegation on page 5 of the transcript as follows:

" 'That, thereafter, as your petitioner is informed and believes, and therefore alleges the fact to be, the inspector who took said testimony under the direction of said Commissioner, strongly recommended that the said Wong Quen Luck be admitted to the United States, and that he be permitted to reside therein, and that the said application for admission be granted, and said petitioner alleges upon information and belief that the said recommendations were so made for the reason that the said testimony so submitted clearly established the right of said detained person to enter the United States and reside therein.' "

Had counsel been properly informed concerning the facts of this case, he certainly would not have

made such an allegation, for there was no such report in the record”.

In explanation of this allegation, and which explanation was also made to the lower Court at the hearing held therein and not denied, the Department of Labor refused to permit counsel to examine the record for the purpose of ascertaining whether the said detained had good grounds for a writ of habeas corpus and therefore he was left wholly in the dark as to whether the said allegation was true or not.

The appellee was held incommunicado by the immigration officers and no opportunity was given anyone to see him or the record. When he was brought into the presence of the Court under an immigration guard he alleged that the official interpreter who had interrogated him at the hearing before the Department of Labor could not speak his dialect properly and that accounted for the slight and trivial variations in the testimony offered by himself and his father. Both the District Attorney's Office and the Department of Labor were represented at the time the statement was made to the Court and it was agreed that the Court have the detained questioned through the official Court interpreter, D. D. Jones. The District Attorney thereupon put the detained through a rigid cross-examination. No record of this examination was taken for the reason that whilst not explicitly, it was tacitly understood that no appeal would be

prosecuted from the final decision of the Court. This examination so clearly demonstrated that a mistake had been made in the interpretation that the Court ordered the detained's discharge. A stipulation as to the facts was subsequently agreed upon by the counsel for the detained and the District Attorney as follows:

*"In the District Court of the United States,
in and for the Northern District of
California, First Division.*

No. 15395

In the Matter of the Application of
WONG HONG, for a Writ of Habeas
Corpus for and on behalf of WONG
QUEN LUCK.

STIPULATION.

It is hereby stipulated and agreed, by and between the respective parties in the above entitled cause, that the facts appearing before said court on the 12th day of November, A. D. 1915, at which time the said court permitted the said Wong Quen Luck, on hearing on the return to writ of habeas corpus, to take the stand and explain certain discrepancies in his testimony and the testimony of his alleged father, are as follows:

The detained, Wong Quen Luck, contended that the discrepancies which appeared in his testimony and the testimony of his father at the hearing had before the immigration officials, and upon which he was not permitted to enter the United States, was due to the fact that the official interpreter, who acted for the immigration officials at the time that the testimony of the said applicant was taken spoke a different dialect from that spoken by the said detained, and because of the fact that the said official interpreter spoke a dialect which was

not understood by the detained, the hearing granted him upon his application to enter the United States was unfair.

Upon the foregoing statement, the Honorable M. T. Dooling, judge of the above entitled court, permitted said detained to take the stand, and the answers of the said detained to the various questions propounded to him by his counsel and the United States Attorney's office, through the official Chinese court interpreter, namely, D. D. Jones, explained the discrepancies satisfactorily to the court and the said detained was ordered released.

Dated this 17th day of May, A. D. 1916.

JOHN W. PRESTON,
United States Attorney.

CASPAR A. ORNBAUM,
Assist. United States Att.

JOSEPH P. FALLON,
Attorney for Wong Quen Luck.

(Endorsed): Filed May 18, 1916.

W. B. MALING, Clerk.

By C. W. Calbreath,
Deputy Clerk."

Nowhere does it appear that objection was made to the District Court's taking jurisdiction of the matter and in fact it appeared at the hearing before said Court that all parties concerned seemed anxious that the matter be considered fully to determine whether there was any merit to the charge of mistake and unfairness. That a mistake had been made in the interpretation of the dialect was so clearly demonstrated by the cross-examination of the detained conducted by the District Attorney assisted by the immigration official Inspector, and it so conclusively established the

relationship claimed, that the Court determined that a mistake had been made and ordered the discharge of the detained. Having apparently been anxious to demonstrate in Court the utter absurdity of the claims of the detained, that he had been unfairly treated in the interpretation before the Department of Labor, it is in decidedly bad form for them now to complain after they had been routed and the decision of the Court was against them.

The detained is the son of a citizen of the United States. He was examined without the presence of counsel and held during all the time his case was under consideration both by the Department of Labor and the Court, under close surveillance by the immigration officials, and for a few slight variations in the testimony of his father and himself was denied the right to land in this country. He had no opportunity to disclose the real facts to his counsel as to the mistakes in interpretation, and it was only in open Court that he was permitted so to do.

Counsel for the Government contends that the Court had no right to take jurisdiction of the matter. Our contention is that whether or not the weight of the evidence in substantial conflict at the hearing is a question of fact within the exclusive jurisdiction of the offices of the Department of Labor, nevertheless the question of fraud or mistake is one of which the Courts can take jurisdiction, and are not without power of review. That was not a

fair hearing that permitted an interpreter to be employed that did not speak the same dialect as the detained, and allowed mistakes to be made which resulted in a false finding. The grounds for denial were trivial in the first instance, and there was no substantial evidence to support the charge and finding of the Department of Labor. Where injurious error in deciding a question is made by any executive or quasi-judicial officer or tribunal it is reviewable and remediable by the Courts. *School of Magnetic Healing v. McNulty*, 187 U. S. 94, 108, 23 Sup. Ct. 33; 47 L. Ed. 90. *Interstate Commerce Commission v. Louisville and Nashville R. R. Co.*, 227 U. S. 88, 91, 33 Sup. Ct. 185, 57 L. Ed. 431 and cases cited; *Howe v. Parker*, 190 Fed. 738, 746, 111 C. C. A. 466, 474, and cases there cited.

In the absence of substantial evidence to sustain the same, the order of deportation is arbitrary and unfair and subject to judicial review. *Whitfield v. Hanges*, 222 Fed. 745, 751; *McDonald v. Sier Tak Sam*, 225 Fed. 710; *Ex parte Sam Pui*, 217 Fed. 456; *Ex parte Chan Kam*, 232 Fed. 855.

We respectfully urge that the judgment of the District Court be sustained.

Dated, San Francisco,
March 5, 1917.

JOSEPH P. FALLON,
Attorney for Appellee.

